THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

REF

346·4 Msc. North

UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-common-pleas_1871-1872_7

Edward [illegible]
[illegible]
1873.

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—Sir Roundell Palmer, Knt., M.P., Q.C.

EX-OFFICIO MEMBERS.

The Attorney-General, Sir J. D. Coleridge, Knt., M.P.

The Solicitor-General, Sir George Jessel, Knt., M.P.

ELECTED MEMBERS.

Mr. Serjeant O'Brien	Serjeants' Inn.
Mr. Serjeant Pulling	
Sir Roundell Palmer, Knt., M.P., Q.C.	Lincoln's Inn.
R. P. Amphlett, Esq., M.P., Q.C.	
William Forsyth, Esq., Q.C.	Inner Temple.
H. Warwick Cole, Esq., Q.C.	
T. W. Greene, Esq., Q.C.	Middle Temple.
John Gray, Esq., Q.C.	
John A. Russell, Esq., Q.C.	Gray's Inn.
William Cracroft Fooks, Esq., Q.C.	
William Williams, Esq. (Firm—Messrs. Currie and Williams), Lincoln's Inn Fields	Incorporated Law Society.
W. S. Cookson, Esq. (Firm—Messrs. Cookson, Wainewright, & Pennington), 6, New Square, Lincoln's Inn	

Secretary—James Thomas Hopwood, Esq., 3, New Square, Lincoln's Inn.

THE

LAW REPORTS.

Court of Common Pleas.

REPORTED BY

JOHN SCOTT AND EDMUND LUMLEY,

BARRISTERS-AT-LAW.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

VOL. VII.

FROM MICHAELMAS TERM, 1871, TO TRINITY TERM, 1872,

BOTH INCLUSIVE.

XXXV VICTORIA.

LONDON:
Printed for the Incorporated Council of Law Reporting for England and Wales
BY WILLIAM CLOWES AND SONS,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 51, CAREY STREET, LINCOLN'S INN, W.C.
1872.

BIBL.
LONDIN.
UNIV.

JUDGES

OF

THE COURT OF COMMON PLEAS,

XXXV VICTORIA.

The Right Hon. Sir WILLIAM BOVILL, Knt., C.J.
Sir JAMES SHAW WILLES, Knt.
Sir JOHN BARNARD BYLES, Knt.
Sir HENRY SINGER KEATING, Knt.
Sir WILLIAM BALIOL BRETT, Knt.
Sir ROBERT PORRETT COLLIER, Knt.
Sir WILLIAM ROBERT GROVE, Knt.

ATTORNEYS GENERAL.

Sir ROBERT PORRETT COLLIER, Knt.
Sir JOHN DUKE COLERIDGE, Knt.

SOLICITORS GENERAL.

Sir JOHN DUKE COLERIDGE, Knt.
Sir GEORGE JESSEL, Knt.

ERRATA.

Page	*Line*	*For*	*Read*
107	Note (4)	6 C. P.	5 C. P.
112	15 from bottom	contractors	contractor
164	23	be	have
239	10 from bottom	s. 8	s. 6
623	5	actionable."	actionable.
623	7	subject-matter.	subject-matter."

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Alexander *v.* Vanderzee 530

Anderson *v.* Pacific Fire and Marine Insurance Company 65

Arden *v.* Wilson 535

Aries, Wadmore *v.* 212

Austin *v.* Cull 227

———, Stanton *v.* 651

B.

Barber, Cope *v.* 393

Barnes, Johnson *v.* 592

Barrett *v.* Markham 405

Bateson *v.* Gosling 9

Bayley *v.* Manchester, Sheffield, and Lincolnshire Railway Company 415

Bechervaise *v.* Lewis 372

Bendle *v.* Watson 163

Blake, Revell *v.* 300

Blower *v.* Great Western Railway Company 655

Blues, Simpson *v.* 290

Bogardus, De Gendre *v.* 409

Boon, Ford *v.* 150

Brannan, Steele *v.* 261

Brecon Markets Company *v.* Neath and Brecon Railway Company 555

Brinsmead *v.* Harrison 547

Buckley *v.* Wrigley 185

C.

PAGE

Chorlton *v.* Overseers of Stretford 198

——— *v.* Overseers of Tonge 178

Cockle *v.* The London and South Eastern Railway Company 321

Conservators of the Thames, Winch *v.* 458

Cook *v.* Guerra 132

Coombe, Edwards *v.* 519

Cope *v.* Barber 393

Coppard, Varley *v.* 505

Cory *v.* Churchwardens of Greenwich 499

Crowe, Roberts *v.* 629

Cull, Austin *v.* 227

D.

Dear, Wadmore *v.* 212

De Gendre *v.* Bogardus 409

De Mattos *v.* Saunders 570

Denoon *v.* The Home and Colonial Assurance Company 341

Dixon, Simey *v.* 190

Dudman, Vigar *v.* 72

E.

Edwards *v.* Coombe 519

Escott, Moger *v.* 158

Evans *v.* Roe. 138

F.

PAGE

Fereday, Jenkins *v.* 358
Fernie *v.* Scott 202
Firth *v.* Widdicombe 172
Ford *v.* Boon 150
Fowler *v.* Lock 272

G.

Gardner, Stafford *v.* 242
Gellatly, Richards *v.* 127
Gosling, Bateson *v.* 9
Great Western Railway Company, Blower *v*, 655
Green, Phosphate of Lime Company *v.* 43
Greenwich, Churchwardens of, Cory *v.* 499
Grimwood *v.* Moss 360
Guerra, Cook *v.* 132

H.

Hardwick, Kitson *v.* 473
Harris *v.* Scaramanga 481
Harrison, Brinsmead *v.* 547
————, Henwood *v.* 606
Heilbutt *v.* Hickson 438
Henwood *v.* Harrison 606
Hickson, Heilbutt *v.* 438
Hodgson, Holland *v.* 328
Holland *v.* Hodgson 328
Home and Colonial Assurance Company, Denoon *v.* 341
Horne *v.* Midland Railway Company 583
Huckle *v.* Piper 193
Humphries, Whitmore *v.* 1

J.

Jenkins *v.* Fereday 358
Johnson *v.* Barnes 592

K.

King, Ex parte 74
Kitson *v.* Hardwick 473

L.

PAGE

Lampeter Union, Pegge *v.* 366
Lee *v.* Walker 121
Lewis, Bechervaise *v.* 372
Lock, Fowler *v.* 272
London, Mayor of, Tyson *v.* 18
London and South Eastern Railway Company, Cockle *v.* 321

M.

Manchester, Sheffield and Lincolnshire Railway Company, Bayley *v.* 415
Markham, Barrett *v.* 405
M'Carthy *v.* Metropolitan Board of Works 508
Metropolitan Board of Works, M'Carthy *v.* 508
Midland Railway Company, Horne *v.* 583
Moffatt, North British Insurance Company *v.* 25
Moger *v.* Escott 158
Mollett *v.* Robinson 84
Moss, Grimwood *v.* 360

N.

Neath and Brecon Railway Company, Brecon Markets Company *v.* 555
North British Insurance Company *v.* Moffatt 25
North Eastern Railway Company, Richardson *v.* 75

P.

Pacific Fire and Marine Insurance Company, Anderson *v.* 65
Pappa *v.* Rose 32, 525
Pegge *v.* Guardians of Lampeter Union 366
Peru, Republic of, *v.* Weguelin 352
Phillips *v.* Routh 287
Phosphate of Lime Company, *v.* Green 43

PAGE

Piper, Huckle *v.* 193
Powell, Sharp *v.* 253
Power *v.* Wigmore 386

R.

Republic of Peru *v.* Weguelin 352
Revell *v.* Blake 300
Reynolds *v.* Lord of the Manor of Woodham Walter 639
Rice *v.* Slee 378
Richards *v.* Gellatly 127
Richardson *v.* North Eastern Railway Company 75
———, Stanton *v.* 421
Roberts *v.* Crowe 629
Robinson, Mollett *v.* 84
Roe, Evans *v.* 138
Rose, Pappa *v.* 32, 525
Routh, Phillips *v.* 287

S.

Saunders, De Mattos *v.* 570
Scaramanga, Harris *v.* 481
Scott, Fernie *v.* 202
Sharp *v.* Powell 253
Simey *v.* Dixon 190
Simpson *v.* Blues 290
Slee, Rice *v.* 378
Stafford *v.* Gardner 242
Stanton *v.* Austin 651
——— *v.* Richardson 421
Starr *v.* Stringer 383
Steele *v.* Brannan 261

PAGE

St. Marylebone, Overseers of, Townshend *v.* 143
Stretford, Overseers of, Chorlton *v.* 198
Stringer, Starr *v.* 383

T.

Tonge, Overseers of, Chorlton *v.* 178
Townshend *v.* Overseers of St. Marylebone 143
Tyson *v.* Mayor of London 18

V.

Vanderzee, Alexander *v.* 530
Varley *v.* Coppard 505
Vigar *v.* Dudman 72

W.

Wadmore *v.* Aries 212
——— *v.* Dear 212
Walker, Lee *v.* 121
Watson Bendle *v.* 163
Weguelin, Republic of Peru *v.* 352
Whitmore *v.* Humphries 1
Widdicombe, Firth *v.* 172
Wigmore, Power *v.* 386
Wilson, Arden *v.* 535
Winch *v.* Conservators of the Thames 458
Woodham Walter, Lord of the Manor of, Reynolds *v.* 639
Wrigley, Buckley *v.* 185

TABLE OF CASES CITED.

A.

		PAGE
Abel *v.* Lee	Law Rep. 6 C. P. 365	230, 231, 232, 234, 240
Adam *v.* Richards	2 H. Bl. 573	452
Aldridge *v.* Johnson	7 E. & B. 885	450
Alexander *v.* Gardner	1 Bing. N. C. 671	450
Allan *v.* Lake	18 Q. B. 560	441
Allen *v.* Geddes	Law Rep. 5 C. P. 291	181
—— *v.* South Western Railway Company	Law Rep. 2 Q. B. 65	418
Alston *v.* Herring	11 Ex. 822	663
Amies *v.* Stevens	1 Stra. 128	664
Anderson, Ex parte	Law Rep. 5 Ch. App. 473	306
Andrews' Case	4 Eq. 458	630
Anonymous	3 Leon. 122	547
Ashmead *v.* Ranger	1 Ld. Raym. 551	640
Atkinson *v.* Bell	8 B. & C. 277	441
Attorney-General *v.* Earl of Sefton	2 H. & C. 362; 11 H. L. C. 257	541, 542, 544
———— *v.* Lord Hotham	1 T. & R. 209	308
———— *v.* Mathias	4 K. & J. 579	602, 604
———— *v.* Rees	12 Beav. 50	289
Ayers *v.* South Australian Banking Company	Law Rep. 3 P. C. 548	49

B.

Badger, Re	8 E. & B. 728	390
—— *v.* South Yorkshire Railway and River Dun Company	1 E. & E. 347	460, 468
Bailey *v.* Stephens	12 C. B. (N.S.) 91	604
Ball *v.* Herbert	3 T. R. 253	461, 471
Bannerman *v.* White	10 C. B. (N.S.) 844	440
Barclay, Ex parte	5 D. M. & G. 403	332
Bargate *v.* Shortridge	5 H. L. C. 297	49
Barlow *v.* Mumford	Law Rep. 2 C. P. 81	152, 154, 165
Bartlett *v.* Gibbs	5 M. & G. 81	153, 165, 168
Bates, Ex parte	Law Rep. 4 Ch. 577	123, 124, 125, 126
Bayliffe *v.* Butterworth	1 Ex. 425	92
Beatson *v.* Skene	5 H. & N. 838	610, 617

		PAGE
Beckett *v.* Midland Railway Company	Law Rep. 3 C. P. 82, 95	508, 510, 511, 512, 514, 515, 516, 517, 518
Bedingfield *v.* Feak	Cro. Eliz. 467; 1 Eag. & Young, 118	73
Beed *v.* Blandford	2 Y. & J. 278	442
Beeson *v.* Burton	12 C. B. 647	207, 209
Begbie *v.* Fenwick	24 L. T. (N.S.) 58	332
Behn *v.* Burness	3 B. & S. 751, 752	426, 429, 450
Belfast and Ballymena Railway Company and Londonderry and Coleraine Railway Company *v.* Keys	9 H. L. 556	79
Bellingham *v.* Clark	1 B. & S. 332	411
Bennett *v.* Brumfitt	Law Rep. 4 C. P. 407	191
Bentley, Ex parte	2 M. D. & D. 591	332
Berkeley *v.* Elderkin	1 E. & B. 805	521, 523, 524
Bermondsey, Vestry of, *v.* Ramsey	Law Rep. 6 C. P. 247	549
Beta, The	Law Rep. 2 P. C. 447	299
Bigge *v.* Parkinson	7 H. & N. 955	276
Bird *v.* Randall	3 Burr. 1345	550
Bishop *v.* Pentland	7 B. & C. 219	577, 578
Blackburn *v.* Smith	2 Ex. 783, 790	441, 442, 451
Blake *v.* Done	7 H. & N. 465	410
——— *v.* Pilfold	1 M. & Rob. 198, per Taunton, J.	621
Blasco *v.* Fletcher	14 C. B. (N.S.) 147	429
Booth *v.* Gair	15 C. B. (N.S.) 291	487
Borries *v.* Hutchinson	18 C. B. (N.S.) 445	587
Bostock *v.* Jardine	3 H. & C 700	91, 92, 97, 101, 111
Boultbee *v.* Stubbs	18 Ves. 20	13
Bowes *v.* Pontifex	3 F. & F. 739	442
Boyd *v.* Dubois	3 Camp. 133	663
—— *v.* Shorrock	Law Rep. 5 Eq. 72	332, 334, 336, 340
Brabant *v.* Wilson	Law Rep. 1 Q. B. 44	541, 542
Bradford Union *v.* Clerk of the Peace for Wilts	Law Rep. 3 Q. B. 604	368
Brass *v.* Maitland	6 E. & B. 470	659, 663
Brett *v.* Beales	10 B. & C. 508	561, 566
Brett's Case	Law Rep. 6 Ch. App. 800	635
Bridger's Case	Law Rep. 4 Ch. App. 266	635
Bridges *v.* North London Railway Company	Law Rep. 6 Q. B. 377	327
——— *v.* Smyth	5 Bing. 410	362
British Columbia Saw-Mill Company *v.* Nettleship	Law Rep. 3 C. P. 499	586, 588, 591
British Provident Life and Fire Assurance Society, Re. Grady's Case	1 D. J. & S. 488	49
Brittain *v.* Lloyd	14 M. & W. 762	102
Bromage *v.* Prosser	4 B. & C. 255	626
Brotherhood's Case	31 Beav. 365	63
Brown *v.* Cocking	Law Rep. 3 Q. B. 672	308
——— *v.* Edgington	2 Man. & G. 279	427
——— *v.* Hare	4 H. & N. 822	450
——— *v.* Bussell	Law Rep. 3 Q. B. 251	257
——— *v.* Stapyleton	4 Bing. 119	348
——— *v.* Wootton	Cro. Jac. 73; Yelv. 67; Moore, 762	547, 549, 550, 551, 553, 554
Brumfitt *v.* Roberts	Law Rep. 5 C. P. 224	224
Bryan *v.* Winwood	1 Taunt. 208	4
Brydon *v.* Stuart	2 Macq. 30	280

		PAGE
Brymer *v.* Atkins	1 H. Bl. 165	306
Buccleuch, Duke of, *v.* Metropolitan Board of Works	Law Rep. 5 H. L. 418	517
Buckland *v.* Johnson	15 C. B. 145	549
Burder *v.* Veley	12 A. & E. 233	306
Burgess *v.* Wickham	3 B. & S. 669	427
Burrows *v.* March Gas Company	Law Rep. 5 Ex. 65; in error, Law Rep. 7 Ex. 96	256
Burton *v.* Brooks	11 C. B. 41	207

C.

Caledonian Railway Company *v.* Ogilvy	2 Macq. 229, at p. 235	511, 513 514, 515, 516, 517
Carlisle, Mayor of, *v.* Wilson	5 East, 2	564
Carr *v.* Lambert	Law Rep. 1 Ex. 168	604
—— *v.* Lancashire and Yorkshire Railway Company	7 Ex. 707, at pp. 712, 713	661, 662
Cary *v.* Dawson	Law Rep. 4 Q. B. 568	359
Cahill *v.* London and North Western Railway Company	10 C. B. (N.S.) 154	80
Chamberlain *v.* West End of London, &c., Railway Company	2 B. & S. 605, 617	511, 512, 517
Chapman *v.* Morton	11 M. & W. 534	442
Chartered Bank of India *v.* Rich	4 B. & S. 73	289
Chew *v.* Jones	10 L. T. 231	275, 280
Clark *v.* Brown	18 Wendell, 213, 229	255
—— *v.* Ocean Insurance Company	16 Pickering, 289	346
—— *v.* Rochester and Syracuse Railway Company	4 Kernan, 570	660
Clarke *v.* Dickson	E. B. & E. 148	441, 451
—— *v.* Westrope	18 C. B. 765	248
Claxton *v.* Swift	3 Mod. 86; 2 Show, 494	550
Climie *v.* Wood	Law Rep. 3 Ex. 257; Law Rep. 4 Ex 328	332, 333, 334
Clipsham *v.* Vertue	5 Q. B. 265	427
Cochrane *v.* Green	9 C. B. (N.S.) 448	376
Cocke *v.* Jennor	Hob. 66	547, 550
Codd *v.* Brown	15 L. T. (N.S.) 536	246, 247
Collard *v.* South Eastern Railway Company	7 H. & N. 79	586
Collen *v.* Wright	7 E. & B. 301	92
Colton *v.* Smith	1 Cowp. 47	562, 563, 567
Constable *v.* Cloberrie	Palm. 397	433
Conway *v.* Nall	1 C. B. 643	136
Coogan *v.* Luckett	2 C. B. 182	187
Cook *v.* Luckett	2 C. B. 168	163
Corbet *v.* Barnes	W. Jones, 377	550
Corcoran *v.* Gurney	1 E. & B. 456	577, 578
Cory *v.* Thames Ironworks Company	Law Rep. 3 Q. B. 181, at p. 186	586, 588
Cotton, Ex parte	2 M. D. & D. 725	332
Coutourier *v.* Hastie	8 Ex. 40	107
Cox *v.* Burbidge	13 C. B. (N.S.) 430	256
Creyke's Case	Law Rep. 5 Ch. App. 63	635
Crisp *v.* Bunbury	8 Bing. 394	640
Crispe *v.* Belwood	3 Lev. 424	562, 563, 567
Croft *v.* Lumley	5 E. & B. 648	363

		PAGE
Cropper v. Cook	Law Rep. 3 C. P. 194	107
Crusoe d. Blencowe v. Bugby	3 Wils. 234	506, 507
Cullwick v. Swindell	Law Rep. 3 Eq. 249	332
Cusack v. Robinson	1 B. & S. 299	442
Cutter v. Powell	2 Sm. L. C. 6th ed. 1, 26	440

D.

Daniel v. Bond	9 C. B. (N.S.) 716	353, 356
—— v. Camplin	7 M. & G. 167, 182	153, 157
—— v. Hanslip	2 Lev. 67	600
Dantzig, The	Bro. & Lush, 102	292
Davis v. Waddington	7 M. & G. at p. 45	207, 209
Davison v. Duncan	7 E. & B. 229	614
Dawkins v. Lord F. Poulet	Law Rep. 5 Q. B. 94	626
—— v. Lord Rokeley	Cam. Scac. H. Vac. 1872	626
Dawson, Tate, & Co., Re	Ir. Law Rep. 2 Eq. 218	332, 340
D'Eyncourt v. Gregory	Law Rep. 3 Eq. 382	335
Deering v. Earl Winchilsea	2 B. & P. 270	634, 637
Delacherois v. Delacherois	11 H. L. 62	600
Dendy v. Nicholl	4 C. B. (N.S.) 376	362, 363
De Nicholls v. Saunders	Law Rep. 5 C. P. 589	135, 136, 137
Dennett v. Pass	1 Bing. N. C. 388	600
Dent v. Smith	Law Rep. 4 Q. B. 414	487, 498
Depan v. Ocean Insurance Company	5 Cowen, 63	496
Devaux v. L'Anson	5 Bing. N. C. 519	346
Dibdin v. Swan	1 Esp. 28, per Lord Kenyon	622
Dickenson v. Jardine	Law Rep. 3 C. P. 639	488
Dimech v. Corlett	12 Moo. P. C. 199	429
Dixon v. Yates	5 B. & Ad. at p. 340	450
Doe d. Mason v. Mason	3 Wils. 63	640
—— v. Massey	17 Q. B. 373	4
—— v. Meux	1 C. & P. 346	362
—— v. Mulliner	1 Esp. 460	6
—— v. Williams	7 C. & P. 322	365
—— v. Wilson	11 East, 56	4
Dowse, The	Law Rep. 3 A. & E. 135	291, 298
Drake v. Mitchell	3 East, 251, at p. 259	548, 549
Dr. Grenville v. The College of Physicians	12 Mod. 386	364
Drury v. Kent	2 Cro. Jac. 14	600
Dumpor's Case	1 Sm. L. C. 6th ed. 30	363
Dunne v. Anderson	R. & M. 287; 3 Bing. 88, per Best, C.J.	622
Durant v. Kennett	Law Rep. 5 C. P. 262	208
Dynen v. Leach	26 L. J. (Ex.) 221	275, 278

E.

Eaden v. Cooper	11 C. B. 18	152
Edinburgh and Glasgow Railway Company v. Magistrates of Linlithgow	1 Macq. 1; 3 Macq. 691	562, 564
Edwards v. Gabriel	7 H. & N. 520	306
Edwards v. North Western Railway Company	Law Rep. 5 C. P. 445	418
Eidsforth v. Farrer	4 C. B. 9	181
Elston v. Rose	Law Rep. 4 Q. B. 4	308

PAGE
Erichsen *v.* Barkworth . . . 3 H. & N. 601; in error 3 H. & N. 394 . . . 653
Etches *v.* Aldan . . . 1 M. & R. 157 . . . 346
Evans *v.* Smallcombe . . . Law Rep. 3 H. L. 249 . 49, 51, 52
Everard *v.* Hopkins . . . 2 Bul. 332 . . . 590
——— *v.* Kendall . . . Law Rep. 5 C. P. 428 291, 292, 298

F.

Fairbridge *v.* Pace . . . 1 C. & K. 317 . . . 654
Falmouth (Lord) *v.* George . . 5 Bing. 286 . . 564, 565
Faviell *v.* Gaskoin . . . 7 Ex. 273 . . 246, 247
Fessard *v.* Mugnier . . . 18 C. B. (N.S.) 286 . . 521
Finden *v.* Westlake . . . M. & M. 461, per Tindal, C. J. 621
Fisher *v.* Dixon . . . 12 Cl. & F. 312 . . 332
Fleet *v.* Murton . . . Law Rep. 7 Q. B. 126 . . 107
Fletcher *v.* Alexander . . . Law Rep. 3 C. P. 375 . . 487
Flint *v.* Femyng . . . 1 B. & Ad. 45. . 345, 346, 349
Flounders *v.* Donner . . . 2 C. B. 63 . . 165, 168
Forbes *v.* Aspinall . . . 13 East, 323 . . 346, 352
Foreman *v.* Free Fishers of Whitstable . Law Rep. 4 H. L. 266 . 563, 565
Forrest *v.* Greenwich . . . 8 E. & B. 890 . . 502, 504
Forster *v.* Forster . . . 4 B. & S. 187 . . . 304
Foster *v.* Jackson . . . Hob. 52, at p. 59, 2 Brounl. 311; Moore, 857 . . 548
Fragano *v.* Long . . . 4 B. & C. 219 . . . 441
France *v.* Gaudet . . . Law Rep. 6 Q. B. 199 . . 587
Freeman *v.* Taylor . . . 8 Bing. 124 . . 427, 433
Fryer *v.* Bodenham . . . Law Rep. 4 C. P. 529 . . 208
Fryer *v.* Kinnersley . . . 15 C. B. (N.S.) 422 . . 622
Fulmerston *v.* Steward . . . Plowd. 102 . . . 476

G.

Gabay *v.* Lloyd . . . 3 B. & C. 793 . . . 660
Gadsby *v.* Barrow . . . 7 M. & G. 21 . . 194, 195
Gardner *v.* Booth . . . 2 Salk. 549 . . . 306
Gardner *v.* Slade . . . 13 Q. B. 796 . . . 621
Garrard *v.* Giubilei . . . 11 C. B. (N.S.) 616; in error, 13 C. B. (N.S.) 832 . . 410
Gee *v.* Lancashire and Yorkshire Railway Company . . . 6 H. & N. 211 . . . 589
Gibson *v.* Hammersmith Railway Company . . . 2 Dr. & P. 603 . . 332
——— *v.* Small . . . 4 H. L. 353 . . 427, 435
Gifford, Ex parte . . . 6 Ves. 805 . . . 13
Giles *v.* The Cynthia . . . 1 Peter's Adm. R. 203, 206 . 348
Giraud *v.* Richmond . . . 2 C. B. 835 . . 141
Glendinning, Ex parte . . . Buck's B. C. 517 . . 14
Goff *v.* Great Northern Railway Company 3 E. & E. 672 . . . 418
Goodall *v.* Little . . . 1 Sim. (N.S.) 155 . . 289
——— *v.* Ray . . . 4 Dowl. 76 . . . 375
Gould *v.* Capper . . . 5 East. 345 . . . 306
Grant *v.* Oxford Local Board of Health . Law Rep. 4 Q. B. 9 . . 501
Great Indian Peninsular *v.* Saunders . 1 B. & S. 41; 2 B. & S. 266 . 487
Great Western Railway Company *v.* Rous Law Rep. 4 H. L. 650 . . 564
Green *v.* Wynn . . . Law Rep. 7 Eq. 28; Law Rep. 4 Ch. 204 . . 11, 12, 14

		PAGE
Greenland *v.* Chaplin	5 Ex. 243	256
Greenough *v.* M'Clelland	2 E. & E. 424	375
Gregory *v.* Duke of Brunswick	1 Car. & K. 24 (per Tindal, C.J.)	622
Guldfaxe, The	Law Rep. 2 A. & E. 325	300
Gustaf, The	Lush. Rep. 506	295

H.

Hadley *v.* Baxendale	9 Ex. 341	586, 591, 592
Haley *v.* Hammersley	3 D. F. & J. 587	332
Hall *v.* Janson	4 E. & B. 500	91, 346
—— *v.* Renfro	3 Metcalfe Ky. 51	660
Hallen *v.* Runder	1 C. M. & R. 266	332
Hallett *v.* Wigram	9 C. B. 580	487
Hamilton *v.* Bass	12 C. B. 631	187
Hammack *v.* White	11 C. B. (N.S.) 588	286
Hanson, Ex parte	12 Ves. 346	375
Harman *v.* Clarke	4 Camp. 159	653
—— *v.* Mant	4 Camp. 161	653
Harmer *v.* Cornelius	5 C. B. (N.S.) 236	36, 526
Harnor *v.* Groves	15 C. B. 667	442
Harris *v.* Thompson	13 C. B. 333	610
Harrison *v.* Bush	5 E. & B. 344	609, 622
—— *v.* Great Western Railway Company	3 H. & C. 231	257
—— *v.* London and Brighton Railway Company	2 B. & S. 122	79, 662
Havelock v. Geddes	10 East. 536, 564	432, 435
Hazard *v.* Mare	6 H. & N. 434	521
Head *v.* Tattersall	Law Rep. 7 Ex. 7	441
Hearne *v.* Garton	2 E. & E. 66	663
Helbert *v.* Banner	Law Rep. 5 H. L. 28	635
Hellawell *v.* Eastwood	6 Ex. 295	332, 336, 337, 338, 339, 340
Hemmingway, Ex parte	26 L. T. (N.S.) 298	521, 522
Henderson *v.* Broomhead	4 H. & N. 569	626
Herbert *v.* Sayer	5 Q. B. 965	476, 480
Heydon's (Sir John) Case	11 Co. Rep. 5	550
Hill *v.* Philp	7 Ex. 232	353, 354, 355, 356, 357
Hinde *v.* Chorlton	Law Rep. 2 C. P. 104	224
Hitcham *v.* Murcham	Noy, 4	547
Hitchins *v.* Brown	2 C. B. 25	154, 155, 165, 168
Hoare *v.* Silverlock	9 C. B. 20	266
Hodgson *v.* Scarlett	1 B. & Ald. 232	609
Hoey *v.* Felton	11 C. B. (N.S.) 142	256
Holmes *v.* Kidd	3 H. & N. 891	375
Home *v.* Lord Camden	2 H. Bl. 533	306
Honey *v.* Rice	2 Roll. Rep. 224	548
Houldsworth *v.* Evans	Law Rep. 3 H. L. 263, 276	51, 52
Howitt *v.* Stephens	5 C. B. (N.S.) 30	154, 157
Hudson's Case	Law Rep. 12 Eq. at p. 7	634, 436, 637
Humble *v.* Langston	7 M. & W. 517	634
Humfrey *v.* Dale	7 E. & B. 266	92
Hunt *v.* Hewitt	7 Ex. 236	356
Hunt *v.* Silk	5 East, 449	441, 442, 451
Hunter *v.* Potts	4 Camp. 203	663
Hutchins *v.* Denziloe	1 Hagg. Con. R. 170	399
Hutchinson *v.* Guion	5 C. B. (N.S.) 149	659, 663
—— *v.* Kay	23 Beav. 413	332

I.

		PAGE
Imperial Bank of China, &c., *v.* Bank of Hindustan, &c.	Law Rep. 6 Eq. 91	52
Ionides *v.* Pacific Insurance Company	Law Rep. 6 Q. B. 674	68, 70
Isberg *v.* Bowden	8 Ex. 852	374

J.

Jarratt *v.* Steele	3 Phill. 170	404
Jenkins *v.* Betham	15 C. B. 168 at p. 181	35, 38, 40, 526, 529
——— *v.* Harvey	2 C. M. & R. 393	564, 565
——— *v.* Hutchinson	13 Q. B. 744	92
Jennings *v.* Brown	9 M. & W. 496	371
Jones *v.* Carter	15 M. & W. 718	361, 364
——— *v.* Dowle	9 M. & W. 19	551
——— *v.* Just	Law Rep. 3 Q. B. 197	427
Josling *v.* Irvine	6 H. & N. 512	589

K.

Kazan, The	Bro. & Lush. 1	292
Kearsley *v.* Cole	16 M. & W. 128	11, 13, 15, 17
Kemp *v.* Halliday	Law Rep. 1 Q. B. 520	348
Kidston *v.* Empire Marine Insurance Company	Law Rep. 1 C. P. 535; in error, Law Rep. 2 C. P. 357	487
Kine *v.* Sewell	3 M. & W. 297	621
King *v.* Hoare	13 M. & W. 494	547, 549, 551, 553, 554
Kingsford *v.* Marshall	8 Bing. 458, at p. 463	577
Knill *v.* Hooper	2 H. & N. 277	427

L.

Lambert *v.* Mayor of Nottingham	Willes, 111	226
——— *v.* Overseers of St. Thomas, New Sarum	12 C. B. 642	174
Lancaster *v.* Eve	5 C. B. (N.S.) 717	332
Langton *v.* Higgins	4 H. & N. 402	450
Lawless *v.* Anglo-Egyptian Cotton and Oil Company	Law Rep. 4 Q. B. 262	623
Lawrence *v.* Aberdein	5 B. & Ald. 107	660
Lendall and Pinfold's Case	1 Leon. 19	547
Lewis, Ex parte	Glyn. & J. 69	475
——— *v.* Jones	4 B. & C. 506, at p. 515	14
——— *v.* Marshall	7 M. & G. 729	345
Limpus *v.* London General Omnibus Company	1 H. & C 526	417
Lingwood *v.* Gyde	Law Rep 2 C. P. 72	541, 542, 543, 544, 545
Lisburne, Earl of *v.* Davies	Law Rep. 1 C. P. 259	4, 6, 7
Livingston *v.* Bishop	1 John. U. S. 290	549
Loder *v.* Kekule	3 C. B. (N.S.) 128	443
London, Mayor of *v.* Hunt	3 Lev. 37	564

		PAGE
London and North Western Railway Company v. Glyn	1 E. & E. 652	29, 31
Longbottom v. Berry	Law Rep. 5 Q. B. 123	331, 332, 334, 340
Lovejoy v. Murray	3 Wallace, 1	551
Luckett v. Knowles	2 C. B. 187	165, 166, 167, 169, 171
Lyme Regis, Mayor of v. Henley	1 Bing. N. C. 222	470
Lyon v. Reed	13 M. & W. at p. 309	364
—— v. Mells	5 East, 427, 429	427, 432, 435
Lyons v. Martin	8 A. & E. 513	416, 420

M.

Macdougall v. Paterson	11 C. B. 755	640
Magdalena Steam Navigation Company, Re	Johns. 690	49
Makin v. London Rice Mill Company	20 L. T. (N.S.) 705; 17 W. R. 768	441
—— v. Watkinson	Law Rep. 6 Ex. 25	654
Malcolmson v. O'Dea	10 H. L. 593	601
Manby v. Witt	18 C. B. 544	621
Marcon v. Bloxam	11 Ex. 586	376
Marshall v. Lynn	6 M. & W. 109	141
Marston v. Phillips	9 L. T. (N.S.) 289	548
Martin v. Roe	7 E. & B. 237	332
Mather v. Fraser	2 K. & J. 536	332, 338, 340
McAndrew v. Chapple	Law Rep. 1 C. P. 643	426, 429
McKenzie v. McLeod	10 Bing. 385	418
M'Creery v. Luttrell	2 Ir. C. L. Rep. 289	635
Mellor v. Spateman	1 Notes to Wms. Saund. p. 612	601, 604
Mersey Docks v. Gibbs	Law Rep. 1 H. L. 93	459, 461, 470, 472
Miles v. Etteridge	1 Show. 349	600
Moffat v. East India Company	10 East, 468	346
—— v. Great Western Railway Company	15 L. T. (N.S.) 630	661
Mole v. Wallis	1 Lev. 81	476, n.
Mondel v. Steel	8 M. & M. 871	441
Moorhouse v. Gilbertson	14 C. B. 70	187
Morgan v. Metropolitan Railway Company	Law Rep. 3 C. P. 553; Law Rep. 4 C. P. 97	21, 22, 24
Morley v. Dunscombe	11 L. T. 199	275, 277, 278
Morris v. Dimes	1 Ad. & E. 654	568
—— v. Robinson	3 B. & C. 196, at p. 206	548
Morris's Case	Law Rep. 7 Ch. App. 200	635
Morisse v. Royal British Bank	1 C. B. (N.S.) 67	640
Morton v. Tibbett	15 Q. B. 428	442
Morton's Case	Cro. Eliz. 30	550
Mould v. Williams	5 Q. B. 469	311
Moule v. Garrett	Law Rep. 5 Ex. 132; in error, Law Rep. 7 Ex. 101	634, 637
Muller v. Gernon	3 Taunt. 394	345
Mullett v. Shedden	13 East, 304	577
Mulloy v. Backer	5 East, 316	348
Muncey v. Dennis	1 H. & N. 216	246

N.

Nepoter, The	Law Rep. 2 A. & E. 375	297

		PAGE
Nevill's Case	Law Rep. 6 Ch. App. 43	633, 634, 636, 638
Nichol *v.* Godts	10 Ex. 191	441
Nicholl *v.* Allen	1 B. & S. 916, 934	460, 470
Nicholls *v.* Bulwer	Law Rep. 6 C. P. 281	165
Nichols *v.* Norris	3 B. & Ad. 41	14
Nicholson *v.* Bradfield Union	Law Rep. 1 Q. B. 620	369
——— *v.* Revill	4 A. & E. 675	11, 14, 15
Nottingham, Mayor of *v.* Lambert	Willes, 111	563
Nuova Raffaelina, The	Law Rep. 3 A. & E. 483	292

O.

Oakes *v.* Turquand	Law Rep. 2 H. L. 325	635
O'Donnell, Ex parte	Law Rep. 1 Q. B. 274	408
Okell *v.* Smith	1 Stark. 107, 109	440, 452
Onions *v.* Bowdler	5 C. B. 65	165, 168
Ormond *v.* Holland	E. B. & E. 102	282
Oulds *v.* Harrison	10 Ex. 572	374
Owen *v.* Homan	3 Mac. & G. 378, 388	11, 14

P.

Pacific, The	Bro. & Lush. 243	295
Palmer *v.* Grand Junction Railway Company	4 M. & W. 479	661
Pardington *v.* South Wales Railway Company	1 H. & N. 392	661
Parker *v.* Palmer	4 B. & A. 387	452
——— *v.* Wallis	5 E. & B. 21	442
Parmiter *v.* Coupland	6 M. & M. 105	628
Parnaby *v.* Lancaster Canal Company	11 A. & E. 223, 230	460, 470
Parr *v.* London, Chatham, and Dover Railway Company	24 L. T. (N.S.) 558	289
Parsons *v.* Hinde	14 W. R. 860	332
——— *v.* St. Matthew, Bethnal Green	Law Rep. 3 C. P. 56	461
Patent Peat Company, Limited	17 L. T. (N.S.) 69	332
Paterson *v.* Wallace	1 Macq. 748	280
Pattison *v.* Jones	8 B. & C. 578	621
Paul *v.* Nurse	8 B. & C. 486	507
Paxton *v.* North British Railway Company	9 Scotch Ses. Cases, 3rd series, 50	660
Peek *v.* North Staffordshire Railway Company	10 H. L. 473	78, 662
Pelham, Lord *v.* Pickersgill	1 T. R. 660, 667	562, 563, 567
Penny and South Eastern Railway Company, Re	7 E. & B. 660	513
Pomfret *v.* Ricroft	1 Wms. Saund. 322	468
Popham *v.* Pickburn	7 H. & N. 891	266
Poulton *v.* Lattimore	9 B. & C. 259	451
——— *v.* South Western Railway Company	Law Rep. 2 Q. B. 534	418
Power *v.* Whitmore	4 M. & S. 141	487, 495
Powell *v.* Gudgeon	5 M. & S. 431	487
Powles *v.* Hider	6 E. & B. 207	275, 277, 278, 282, 283

		PAGE
Powles *v.* Innes	11 M. & W. 10	29
Praeger *v.* Bristol and Exeter Railway Company	24 L. T. (N.S.) 105	326
Preston *v.* Buckley	Law Rep. 5 Q. B. 391	381
Price *v.* Barker	4 E. & B. 760	14
Priestley *v.* Fowler	3 M. & W. 1	278, 282, 285

R.

Read *v.* Langlois	1 Mac. & G. 627	289
Readhead *v.* Midland Railway Company	Law Rep. 2 Q. B. 412, 433, 437	427
Reg. *v.* Bolton	1 Q. B. 66	305, 311
—— *v.* Charlesworth	20 L. J. (M. C.) 181	380, 381, 382
—— *v.* Hicklin	Law Rep. 3 Q. B. 360	261, 263, 265, 267, 268, 270
—— *v.* Lee	Law Rep. 1 Q. B. 241	332
—— *v.* Levi	Leigh & Cave C. C. 597	307
—— *v.* Mayor of London	Law Rep. 2 Q. B. 292	20
—— *v.* Metropolitan Board of Works	Law Rep. 4 Q. B. 358	511, 512, 514, 515, 516
—— *v.* Millis	10 Cl. & F. 859, 860	403
—— *v.* St. Luke, Chelsea	Law Rep. 7 Q. B. 148	518
—— *v.* Tithe Commissioners	14 Q. B. 459	640
—— *v.* Woodham Walter	10 B. & S. 439	640
Reuter *v.* Electric Telegraph Company	6 E. & B. 341	49
Revis *v.* Smith	18 C. B. 126	626
—— *v.* Watson	5 M. & W. 255	600
Rex *v.* Barnes	1 B. & Ad. 113	223
—— *v.* Carlile	3 B. & A. 167	261, 266, 268, 271
—— *v.* Creevey	1 M. & S. 273	269
—— *v.* Dodderhill	3 M. & S. 243	141
—— *v.* Eaton	31 State Trials, 927	266
—— *v.* Inhabitants of Landulph	1 Mood. & Rob. 393	461
—— *v.* ———— Paul	2 Mood. & Rob. 307	461
—— *v.* Newton Toney	2 T. R. 453	141
—— *v.* Severn and Wye Navigation	2 B. & A. 648	471
Reynolds *v.* Clarke	2 Ld. Raym. 1399	258
—— *v.* Fenton	4 C. B. 187	653
Rhode *v.* Thwaites	6 B. & C. 388	452
Richardson *v.* North Eastern Railway Company	Law Rep. 7 C. P. 75	662
Rickards *v.* Bennett	1 B. & C. 223, at p. 233	563, 564, 567
Ricket *v.* Metropolitan Railway Company	Law Rep. 2 H. L. 175, 201	508, 511, 514, 515, 517
Ritchings *v.* Cordingley	Law Rep. 3 A. & E. 113, 119	399
Robbins *v.* Jones	15 C. B. (N.S.) 221	461
Roberts *v.* Smith	2 H. & N. 213	286
Robinson *v.* Lenaghan	2 Ex. 333	306
Roe *v.* Birkenhead, &c., Railway Company	7 Ex. 36	418
—— d. Bennett *v.* Jeffery	2 M. & S. 92	640
—— d. Dingley *v.* Sales	1 M. & S. 297	506
Rogers *v.* Lewis	7 C. B. (N.S.) 29	160, 161, 162
Rohl *v.* Parr	1 Esp. 444	663
Rollestone *v.* Cope	Law Rep. 6 C. P. 292	186
Romney Marsh (Bailiff) *v.* Trinity House Corporation	Law Rep. 5 Ex. 204; in error, Law Rep. 7 Ex. 241	257
Rosetto *v.* Gurney	11 C. B. 176	578

		PAGE
Rotherham *v.* Green	Cro. Eliz. 593; 2 And. 89; Noy, 67; Goldsb. 114, pl. 6	600
Roux *v.* Salvador	3 Bing. N. C. 266, at p. 279	576

S.

Salisbury, Marquis of, *v.* Great Northern Railway Company	17 Q. B. 840	21
Salomons *v.* Pender	3 H. & C. 639	91, 97
Sarquy *v.* Hobson	2 B. & C. 7; in error, 4 Bing. 13	487
Saunders *v.* St. Neot's Union	8 Q. B. 810	369
Schmaltz *v.* Avery	16 Q. B. 655	92
Schroder *v.* Ward	13 C. B. (N.S.) 410	83
Scott *v.* Shepherd	3 Wils. 403; 2 W. Bl. 892	255, 257
—— *v.* Surman	Willes, 400	579
Seagrave *v.* Union Marine Insurance Company	Law Rep. 1 C. P. 305, 320	29
Seymour *v.* Greenwood	6 H. & N. 359	417, 418
Shadwell *v.* Shadwell	9 C. B. (N.S.) 159	368, 371
Sharman *v.* Brandt	Law Rep. 6 Q. B. 720	91
Shepherd *v.* Midland Railway Company	Before Martin and Pigott, BB., on Jan. 23, 1872, not reported	258
—— *v.* Pybus	4 Scott, N. R. 434	427
Sherlock *v.* Steward	7 C. B. (N.S.) 21	187, 189
Sherwood *v.* General Mutual Insurance Company	1 Blatchford's Rep. 251	497
Shipley *v.* Marshall	14 C. B. (N.S.) 566	475
Short *v.* Simpson	Law Rep. 1 C. P. 248	476
Sinden *v.* Banks	3 E. & E. 623	407
Siner *v.* Great Western Railway Company	Law Rep. 4 Ex. 117	325
Sir Thomas Palmer's Case	5 Co. Rep. 24, b.	479
Slim *v.* Great Northern Railway Company	14 C. B. 647	79
Smith *v.* Brown	Law Rep. 6 Q. B. 729	300
—— *v.* London and South Western Railway Company	Law Rep. 5 C. P. 98; in error, Law Rep. 6 C. P. 14	256, 257
—— *v.* Marrable	11 M. & W. 5	281
—— *v.* Roche	6 C. B. (N. S.) 223	371
—— *v.* Shepherd	Cro. Eliz. 710	562
—— *v.* Winter	4 M. & W. 454	14
Solly *v.* Forbes	2 B. & B. 38	11, 12, 15, 17
Somerville *v.* Hawkins	10 C. B. 583	621, 626
Spackman *v.* Evans	Law Rep. 3 H. L. 171	49, 51, 59, 63
Sparrow *v.* Oxford, &c., Railway Company	9 Hare, 437, 443	21
Spill *v.* Maule	Law Rep. 4 Ex. 232	626
Stamford, Corporation of, *v.* Lambert	1 C. & J. 57, 400	568
Stamper *v.* Sunderland	Law Rep. 3 C. P. 388	232
Stebbing *v.* Metropolitan Board of Works	Law Rep. 6 Q. B. 37	21
St. Cloud, The	Bro. & Lush. 4	292, 297, 298
Steward *v.* Wolveridge	9 Bing. 60	635
Stilwell *v.* Ruck	4 H. & N. 468	353, 355
Stockdale *v.* Hansard	9 A. & E. 1	609, 610, 613, 614, 625
Stracey *v.* Nelson	12 M. & W. 535	223, 460, 468
Street *v.* Blay	2 B. & Ad. 456	440, 442, 451
Strick *v.* De Mattos	3 H. & C. 22	575 n.
Stringer *v.* English and Scottish Marine Insurance Company	Law Rep. 4 Q. B. 676; in error, Law Rep. 5 Q. B. 599	577
Stuart *v.* Crawley	2 Stark, 323	81, 661
Stubs *v.* Stubs	1 H. & C. 257, 265	411

		PAGE
Sucksmith *v.* Wilson	4 F. & F. 1083	246
Sutton *v.* Tatham	10 Ad. & E. 27	92
——— *v.* Temple	12 M. & W. 52	276, 280
Swan, The	Law Rep. 3 A. & E. 314	292, 294, 298
Sweeting *v.* Pearce	9 C. B. (N.S.) 534	92
Sylph, The	Law Rep. 2 A. & E. 24	299

T.

Tabart *v.* Tipper	1 Camp. 350, per Lord Ellenborough	622
Talley *v.* Great Western Railway Company	Law Rep. 6 C. P. 44, at p. 51	83, 661
Tarrabochia *v.* Hickie	1 H. & N. 183	426, 429, 432, 433
Taylor *v.* Chichester and Midhurst Railway Company	Law Rep. 2 Ex. 356, 375	49
——— *v.* Hawkins	16 Q. B. 308, at p. 321	621, 626
Tepper *v.* Nichols	18 C. B. (N.S.) 121	212, 222, 223, 224, 225, 226
Thetis, The	Law Rep. 2 A. & E. 365	420
Thompson *v.* Gillespy	5 E. & B. 209	427
Thompson *v.* Ingham	14 Q. B. 710	306
Thornely *v.* Hebson	2 B. & Ald. 513	578
Thornton *v.* Charles	9 M. & W. 802	108
Tobin *v.* Harford	13 C. B. (N.S.) 791; 17 C. B. (N.S.) 528	352
Todd *v.* Hawkins	8 C. & P. 88	621
Toogood *v.* Spyring	1 C. M. & R. 181	622
Townshend *v.* St. Marylebone	Law Rep. 7 C. P. 143	153, 155, 156, 157
Towse *v.* Henderson	4 Ex. 890	427
Trappes *v.* Harter	2 C. & M. 153	332
Tregelles *v.* Sewell	7 H. & N. 574	450
Trenfield *v.* Lowe	Law Rep. 4 C. P. 454	207, 210
Truman *v.* Walgham	2 Wils. 296	562, 566
Tubervil *v.* Stamp	1 Salk. 13	257
Turner *v.* Cameron	Law Rep. 5 Q. B. 306	332, 337
Turner *v.* Hardcastle	11 C. B. (N.S.) 683	136
——— *v.* Sullivan	6 L. T. (N.S.) 130	266
——— *v.* Thomas	Law Rep. 6 C. P. 610	579, 582
Tyrringham's Case	4 Co. Rep. 36b.	600

V.

Van Toll *v.* South Eastern Railway Company	12 C. B. (N.S.) 75	80
Vaughan, Ex parte	Law Rep. 2 Q. B. 114	308
——— *v.* Menlove	3 Bing. (N.C.) 468	257
Verulam, Lord, *v.* Howard	7 Bing. 327	541
Vyse *v.* Wakefield	6 M. & W. 442	653

W.

Wait *v.* Baker	2 Ex. 1	450
Walker *v.* Jackson	10 M. & W. 161	589
——— *v.* London Railway Company	Cited in Walford's Law of Railways, 305	660

		PAGE
Walker *v.* South Eastern Railway Company	Law Rep. 5 C. P. 640	418
Walmsley *v.* Milne	7 C. B. (N.S.) 115	332, 338, 339
Warburton *v.* Overseers of Denton	Law Rep. 6 C. P. 267	199, 200
Warren *v.* Wildee	Law Rep. W. N. 1872, p. 87	283
Wason *v.* Walter	Law Rep. 4 Q. B. 73, at p. 87	609, 613, 614, 617, 624, 625, 626
Waterfall *v.* Penistone	6 E. & B. 876	332
Waters *v.* Monarch Life and Fire Assurance Company	5 E. & B. 870	29, 30
Watkins *v.* Milton-next-Gravesend	Law Rep. 3 Q. B. 350	501, 502, 503, 504
Watson *v.* Mid-Wales Railway Company	Law Rep. 2 C. P. 593	579
Watters *v.* Smith	2 B. & Ad. 889, at p. 892	548
Webb *v.* Hewitt	3 K. & J. 438, at p. 442	12, 14
Wells *v.* Hopwood	3 B. & Ad. 20, at pp. 23, 31, 34	577, 578, 581
West *v.* Dobb	Law Rep. 4 Q. B. 634; in Ex. Ch. Law Rep. 5 Q. B.	297, 506
White *v.* Steele	12 C. B. (N.S) 383	306
Whitechurch *v.* Holworthy	4 M. & S. 340	640
Whitehead *v.* Walker	10 M. & W. 696, 698	375
Whiteley *v.* Adams	15 C. B. (N.S.) 392	623
Wilde *v.* Waters	16 C. B. 637	335
Wilkes *v.* Hungerford Market Company	2 Bing. (N.C.) 281	513
Wilkinson *v.* Verity	Law Rep. 6 C. P. 206	551
Williams *v.* Clough	3 H. & N. 258	286
——— *v.* Earle	Law Rep. 3 Q. B. 739	505
Wilson *v.* Gabriel	4 B. & S. 243	579
Wilson *v.* Lancashire and Yorkshire Railway Company	9 C. B. (N.S.) 632	586, 587
Wiltshear v. Cottrell	1 E. & B. 674	334, 338, 339
Winch *v.* Keely	1 T. R. 619	578
Wodehouse *v.* Farebrother	5 E. & B. 277	376
Wolveridge *v.* Steward	1 C. & M. 644	635
Wood *v.* Hewett	8 Q. B. 913	332
Wood *v.* Stourbridge Railway Company	16 C. B. (N.S) 222	512
Woodward *v.* Lander	6 C. & P. 548, per Alderson, B.	621
Woolley *v.* North London Railway Company	Law Rep. 4 C. P. 602	130, 289
Worth *v.* Terrington	13 M. & W. 781, 795	404
Wyld *v.* Pickford	8 M. & W. 443	663
Wynne *v.* Wynne	2 M. & G. at p. 19	207

Z.

Zunz *v.* South Eastern Railway Company	Law Rep. 4 Q. B. 539	80

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

MICHAELMAS TERM, XXXV VICTORIA.

WHITMORE AND ANOTHER *v.* HUMPHRIES.

1871
Nov. 9.

5 ChD 755
15 ChD 156, 16

Landlord and Tenant—Encroachment, Assent of Landlord—Statute of Limitations (3 & 4 *Wm.* 4, *c.* 27), *s.* 7.

The lessee of certain premises for a term of ninety-nine years, dependent on four lives, enclosed, with the assent of the lessor given by word of mouth, a piece of adjoining waste which belonged to the lessor, as lord of the manor, on the understanding that the piece so enclosed should be treated as if comprised in the lease. Upon the determination of the lease, which was more than twenty-one years from the date of the enclosure, the reversioners brought ejectment to recover the land so enclosed from the tenant:—

Held, that the assent of the landlord to the enclosure of the additional piece of land did not create such a tenancy of the land as to bring the case within the 7th section of 3 & 4 Wm. 4, c. 27, or prevent such enclosure from being an encroachment within the ordinary rule of law that an encroachment made by a tenant must be taken to be made for the benefit of the landlord, and treated as part of the demised premises; and that consequently the statute of limitations did not begin to run till the determination of the lease, and the plaintiffs were entitled to recover the land.

APPEAL from the County Court of Gloucestershire.

This was an action of ejectment brought to recover possession of a cottage, garden and appurtenances situate at Webb's Heath, in the parish of Siston, in the county of Gloucester.

1871

WHITMORE
v.
HUMPHRIES.

The plaintiffs derived title from one Francis Trotman, the younger, one of the lessors named in the indenture of lease after mentioned, and their title, subject to the specific questions raised by the action, was admitted by the defendant.

By indenture of lease, bearing date the 18th of September, 1812, Francis Trotman the elder, the tenant for life of the manor of Siston, and Francis Trotman, the younger, the reversioner in fee of the same manor, in consideration of a fine of 5*s*., and the annual rent of 1*s*., demised to Jonathan Woodington a cottage or dwelling-house, situate at Webb's Heath, in the parish of Siston, and the garden adjoining thereto, containing about twenty-one perches, all which ground so demised was stated to have been some time since enclosed from the waste of the manor of Siston, for the full term of ninety-nine years, if four persons therein mentioned, or any of them should so long live. Francis Trotman, the elder, died in 1824, and Francis Trotman, the younger, in 1835. All the cestuis que vie mentioned in the lease were dead, the last survivor dying on the 9th of February, 1867. Jonathan Woodington died some time before the year 1835, and on his death the premises comprised in the lease were divided among his children, one of whom was Thomas Woodington, who entered into possession and occupied his portion, on part of which at its extreme boundary towards the unenclosed waste had been erected and stood the pigsty and privy hereinafter mentioned. In one corner of the premises comprised in the lease, and immediately contiguous to and bordering upon the common, or open unenclosed land, called Webb's Heath, were a pigsty and privy, which afterwards came into possession of Thomas Woodington.

In the early part of September, 1835, Francis Trotman, the younger, in company with Mr. Coles, his agent or steward, being on Webb's Heath, and passing by the holding of the said Thomas Woodington, he, the said Thomas Woodington, being then standing on his said holding, addressed him, and requested permission to enclose and hold an adjoining piece of common. This permission was given, and it was then and there agreed between the said Francis Trotman and Thomas Woodington that such adjoining piece of land should be held by the said Thomas Woodington upon the same terms as the premises comprised in the lease were held. Thomas Woodington entered accordingly, and enclosed the land.

There was no evidence shewing at what precise time the enclosure was made, but the judge held that what took place on the occasion aforesaid between the parties amounted to and was a present demise.

In 1842 or 1843 the defendant, who had then or afterwards married a daughter of Thomas Woodington, entered and pulled down the pigsty and privy, and erected a house, partly on the site thereof and partly on the piece of additional land enclosed from the waste. Whether he so entered under a demise from or by permission of Thomas Woodington is uncertain, and he continued to reside, and at the time of the action still resided, in the said house. No rent had ever been paid to the plaintiffs or their predecessors in title for or in respect of any of the premises, except that reserved by the lease. No evidence was produced to shew in respect of what particular premises such rent was paid.

The learned judge directed a verdict to be entered for the plaintiffs, as to so much of the house occupied by the defendant as stood upon the site of the pigsty and privy, and, after taking time to consider, ultimately gave judgment as to the remainder, being the land so enclosed as aforesaid, for the defendant. He held that that part of the premises was not an encroachment, but there was a taking by consent of the landlord, and under the parol agreement aforesaid between the landlord and tenant; that the consent so given and agreement made by Francis Trotman was an immediate parol demise, and such parol demise, being for the term of ninety-nine years determinable as aforesaid, by virtue of the 1st section of the Statute of Frauds created only a tenancy at will, and that by force of the 7th section of the Statute of Limitations, 3 & 4 Wm. 4, c. 27, this tenancy determined at the latest at the expiration of one year, and thereupon the right of action of the plaintiffs or their predecessors in title accrued. He also held that the rent reserved under the lease could not be deemed to have been paid in respect of the additional piece of waste land.

Under these circumstances, he held that the plaintiffs' title was barred.

1871

WHITMORE v. HUMPHRIES.

Manisty, Q.C., (*Norris* with him), for the plaintiffs, contended that the assent of the landlord did not make the case out of the ordinary rule of law on the subject of encroachments; viz., that the encroachment must be taken to be made for the benefit of the landlord; that the land in question must be treated as part of the premises included in the original lease, and that, therefore, the Statute of Limitations did not begin to run till the determination of that lease, and the appellants were entitled to recover the land in question. [He cited *Doe* v. *Massey* (1); *Bryan* v. *Winwood* (2); *Earl of Lisburne* v. *Davies.* (3)]

C. W. Wood, for the defendant, contended that an encroachment must be in invitum, and there could not be an encroachment with the assent of the party whose land was encroached upon; that what took place between the parties must therefore amount to a demise, which could only by reason of the provisions of the Statute of Frauds create a tenancy at will, and that consequently the 7th section of the Statute of Limitations (3 & 4 Wm. 4, c. 27) applied, and the plaintiffs' right to recover the premises was barred. [He cited *Doe* v. *Wilson.* (4)]

15 Ch D 116

WILLES, J. This case raises a question upon a branch of the law which involves considerations of some nicety. By the rule of law applicable to this subject the landlord is entitled at the determination of the tenancy to recover from the tenant, not only the land originally demised, but also any land which the tenant may have added to it by encroachment from the waste, such encroachment being deemed to be made by him as tenant as an addition to his holding, and consequently for the benefit of his landlord, unless it is made under circumstances which shew an intention to hold it for his own benefit alone, and not as part of his holding under the landlord. This rule undoubtedly applies when the encroachment is made over land belonging to the landlord, and no inquiry appears ever to have been made in such cases, whether it was made with the consent of the landlord or not. In such cases the reasonableness of the rule is very obvious; it only

(1) 17 Q. B. 373; [20 L. J. (Q.B.) 434.

(2) 1 Taunt. 208.

(3) Law Rep. 1 C. P. 259.

(4) 11 East, 56.

gives back to the landlord that which is rightly his, and prevents the tenant, who has taken advantage of his tenancy to encroach, from keeping that which it would be a breach of the duty arising from the relation of landlord and tenant not to give up. The rule, however, goes further than this. It is not confined to cases where the encroachment is upon land to which the landlord is entitled, it applies to cases where the land encroached upon does not belong to the landlord. It is held in such cases that as between the landlord and the tenant, the tenant must primâ facie be deemed to have taken in the additional land as part of his tenancy, and for the benefit of his landlord. The full extent of the rule of law having been thus stated, it is desirable, I think, to consider the reason of it with reference to that which is put forward in this case as an obstacle to its operation, namely, the Statute of Limitations.

The rule is based upon the obligation of the tenant to protect his landlord's rights, and to deliver up the subject of his tenancy in the same condition, fair wear and tear excepted, as that in which he enjoyed it. There is often great temptation and opportunity afforded to the tenant to take in adjoining land which may or may not be his landlord's, and it is considered more convenient and more in accordance with the rights of property that the tenant who has availed himself of the opportunity afforded him by his tenancy to make encroachments, should be presumed to have intended to make them for the benefit of the reversioner, except under circumstances pointing to an intention to take the land for his own benefit exclusively. The result is to avoid questions which would otherwise frequently arise as to the property in land, and to exclude persons who have come in as tenants, and who are likely to encroach, from raising such questions. The reason of the rule appears on the one hand to be entirely independent of any notion of encroachment being a wrong done, and so also on the other hand it appears to be quite independent of the question, whether the encroachment was made with the assent of the landlord. It might be otherwise if the rule applied only to land belonging to the landlord, because in that case the assent of the landlord might be taken to create some new relation; but when it is considered that the rule is a general one, it does

1871

WHITMORE *v.* HUMPHRIES.

not appear that the fact of assent has any distinct bearing on its operation. The authorities point to the same conclusion as the nature of the rule itself. It is distinctly stated in the ruling of Graham, B., in the case of *Bryan* v. *Winwood* (1), that an encroachment may be with the lessor's consent, and it is clear from the report of the case of *Doe* v. *Mulliner* (2) in which Lord Kenyon is said to have protested against the doctrine of encroachment, that he was dealing there with an encroachment as existing independently of any question of assent or dissent by the landlord. The same result may also be collected from the observations made in the judgment in the case of *Earl of Lisburne* v. *Davies.* (3) The fact that the landlord knows that the tenant is encroaching on his land, and from good nature takes no notice, and does not turn the tenant out, but allows him to hold the encroachment on the same terms as if it had been part of the holding, cannot in good sense put the landlord in a worse position than if the tenant had taken originally without any assent, and by mere wrong unknown to his landlord. For these reasons I come to the conclusion that the meaning of the word "encroachment" is quite apart from any question of assent or dissent on the part of the landlord, and signifies something taken in by the tenant by reason of his being tenant without anything to shew that it was so taken otherwise than for the benefit of the landlord, to be held as part of the demised premises, and given up accordingly at the end of the term. That being so, what were the facts of the present case? All that took place between the parties—I need hardly observe that there was no consideration for any fresh agreement—was an arrangement that the tenant should make an encroachment to be held upon the same terms as if such encroachment had been made without assent. There was no such notion entertained as that the tenant should hold at the will of the landlord; the intention was that the piece of land should be added on gratis to the land held on lease, and held on the same terms. The result of that state of things, apart from any question arising under the Statute of Frauds, would be that on entry by the tenant there would be a demise without rent of the piece of land till the end of the existing term.

---

(1) 1 Taunt. 208.

(2) 1 Esp. 460.

(3) Law Rep. 1 C. P. 259.

The only reason why it should be treated otherwise is the Statute of Frauds, which prevents it operating as such a demise, and the real intention of the parties being thus defeated, it is then argued that by reason of the statute it must be treated as a tenancy at will, a tenancy which the parties had not the slightest intention of creating, and so the case is brought within the 7th section of the Statute of Limitations (3 & 4 Wm. 4, c. 27). No doubt Acts of Parliament must sometimes be dealt with conjointly, and unexpected results will occasionally follow from their combination; but it appears to me that in the present case the Court is not bound to arrive at a conclusion which would involve such a torture of the actual facts of the case as that to which they are invited.

The most that can be said is this—the parties entered into an agreement which probably could not be enforced between them. This agreement merely amounted to this—that they should stand in the same position as if there had been an encroachment made without an agreement. We are now asked to say that the assent of the landlord to this arrangement was fatal to the very state of things which it was intended to bring about, and which would have existed independently of it. I do not think that this is so. The 7th section of the Statute of Limitations is the section upon which the counsel for the defendant relied. If his contention be correct, this very question must have been raised by the facts, and passed over time after time. Suppose a tenant encloses a piece of the waste belonging to the landlord, and the landlord's agent afterwards sees it, and does not interfere, from the moment of such acquiescence there is evidence from which a jury might infer a tenancy. If the defendant's contention be correct, the case would fall within the Statute of Frauds; and after knowledge on the part of the landlord and the lapse of a reasonable time for him to express dissent, and no dissent expressed, a tenancy at will would be created, and a year afterwards the Statute of Limitations would begin to run against the landlord, and after twenty years his title might be barred. This view has never been taken. In the case of *Earl of Lisburne* v. *Davies* (1) it was assumed that, if the case was to be treated as one of encroachment, the Statute of Limitations did not apply. The case must be governed, if the

(1) Law Rep. 1 C. P. 259.

1871

WHITMORE *v.* HUMPHRIES.

5 ChD 758
763, 7

statute applies to an encroachment on the landlord's land, either by the general provisions of the statute, or the peculiar provision of s. 7. If the general provisions of the statute apply when the encroachment is on the land of the landlord, what becomes of the general rule of law applicable to all encroachments, namely, that the tenant is estopped from denying that the encroachment forms part of the holding—which, with reference to such a case, is really only another way of saying that he holds in such a way as that the Statute of Limitations does not apply? The case of an encroachment is a peculiar case in the law, which treats it as being part of the holding. It follows obviously that the general provisions of the Statute of Limitations do not apply to it.

Then with regard to the 7th section; that section assumes that the case referred to in it is one which falls within the general scope of the statute. It deals with the case of an ordinary tenancy at will, and does not apply to this peculiar case.

With regard to the finding of the learned county court judge, that there was an immediate parol demise of the premises for the remainder of the term, with great respect for his decision, it appears to me that it was a straining of the facts. The parties in reality only agreed that there should be an encroachment on the same terms as are usually applicable to encroachments by virtue of the law.

The only remaining question seems to be, whether the defendant is bound as representing the original lessee; and with regard to that, I think it must be taken, from the statement in the case, that the defendant either had a lease from, or was let into possession by Woodington, and therefore stands in the same position as he would.

For these reasons I think our judgment ought to be for the plaintiffs.

KEATING, J., concurred.

BRETT, J. The judgment in this case seems to me to depend mainly on the construction to be put upon the statement of the facts. It is admitted that, if what took place amounted to an encroachment, the action is maintainable, inasmuch as the

1871

WHITMORE
v.
HUMPHRIES.

additional land would then belong to the landlord at the end of the lease, whether twenty years had expired since the encroachment or not. But it was argued that this was not an encroachment, because there was such a special agreement between the parties as prevented it from being so. Without going into the question whether there might be such an agreement as to have this effect, it is sufficient for the decision of this case to say that there was no such agreement here. The tenant gave notice that he intended to encroach in the usual way, and the landlord said he did not mean to interfere. This is nothing but an ordinary case of encroachment, and the judgment must, therefore, be for the plaintiffs.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Freshfields.*
Attorney for defendant: *G. E. Spencer.*

BATESON *v.* GOSLING.

Nov. 14.

8 Ex 82-4-
16 Ex 12, 1
2 Ex. D. 457.
14 Ch D 175

Bankrupt Acts, 1861 *and* 1869 (24 & 25 *Vict. c.* 134, *and* 32 & 33 *Vict. c.* 71)—*Release of Debtor, subject to Reservation of Rights against Sureties—Covenant not to sue—Provisions for carrying on Business by Trustees.*

A deed of arrangement under the Bankruptcy Acts, 1861 and 1869 (24 & 25 Vict. c. 134, and 32 & 33 Vict. c. 71), contained a release of the debtor, subject to a proviso reserving the rights of creditors holding securities:—

Held, that this operated as a covenant not to sue, and not as an extinguishment of the debt so as to bar the remedy against the surety, notwithstanding the deed contained an absolute assignment of all the debtor's property and effects to the trustees, and also provisions for enabling them to carry on the trade for the benefit of the estate.

THE first count of the declaration was by the plaintiff as indorsee against the defendant, Edward Cyrus Gosling, as indorser of a bill of exchange for 25*l.*, dated the 17th of April, 1869, drawn by Charles Gosling upon and accepted by one Daniel Green.

Third plea to the first count. For defence on equitable grounds, that the bill was duly accepted by Green, and that, after the indorsement by the defendant, and while the plaintiff was the holder, and after the bill became due, the plaintiff, by deed registered by Green under the Bankruptcy Act, 1861, and the Bank-

1871

BATESON
v.
GOSLING.

ruptcy Amendment Act, 1869, released Green from all liability upon or in respect of the bill, without reserving the right of the plaintiff to sue the defendant.

Issue thereon.

The cause was tried before Brett, J., at the second sitting for Middlesex in Trinity Term last. In support of the issue raised on the third plea, the defendant put in a deed made the 20th of August, 1869, between Daniel Green of the first part, James Sanderson and Peter M'Vicker, trustees for the joint and separate creditors of Green of the second part, and the creditors of Green of the third part, which contained, amongst others, the following provisions:—

That, in pursuance of the recited agreement, &c., Green, the assignor, did grant, bargain, sell, &c., all the freehold, copyhold, leasehold, and other estates, &c., and all the stock in trade, &c., and all other the real and personal estate and effects of him, the assignor, &c., unto the trustees, their heirs, &c., Upon trust to collect or receive and sell and dispose of the thereby assigned premises, &c.; and, "for the purposes of improving or benefiting the estate, the trustees are hereby impowered to pay or advance any moneys that may be necessary for converting the prepared earth into bricks, and for selling the same:" And upon trust out of the moneys to be received to pay all costs of the deed and attending the trusts and powers thereby created; and, in the next place, "Upon trust thereout, so far as the same may extend, to pay and satisfy rateably and without preference to and amongst the creditors of the assignor the several debts due or owing to them, applying or administering the estate of the assignor for the benefit of his creditors in like manner in all respects as if the assignor had been on and at the date of these presents duly adjudged bankrupt; it being intended that these presents shall operate as a trust-deed for the benefit of creditors within the meaning of the Bankruptcy Act, 1861." The deed then contained the usual power of attorney to the trustees for the purpose of realizing the estate, "and also to adjust, liquidate, and finally settle all accounts, dealings, and transactions whatsoever relating to the trust estate and premises:" Provided also "that any resolution signed by the majority in number of three-fourths in value of the creditors of the assignor shall be binding upon all the several parties hereto, and shall be effectual for the allowance and passing of the accounts of the trustees, and for discharging them from the trusts hereof, and from all claims and demands in respect thereof, and that all questions relating to the said trust-estate shall be decided according to English Bankrupt Law." Then followed a release, in these terms:—"And this indenture lastly witnesseth, that, in consideration of the premises, and of the assignment hereinbefore contained, the several creditors of the third part, subject to the proviso next hereinafter contained, do, and each of them doth, acquit, release, and for ever discharge the assignor from all manner of debt and debts, &c., claims, and demands, &c., which they the releasing parties, or any of them, their or any or either of their partner or partners, now have or hereafter may have against the assignor, his heirs, &c., for or in respect of any debt, &c., up to the day of the date hereof:

Provided always that any creditor or creditors who hath or have any specific lien or security or securities for his or their demand or demands, or any part thereof, or to the payment whereof any person or persons is or are liable as a surety or sureties for the assignor, may execute these presents without prejudice to the same security, or to the claim against any surety or sureties, and, with the consent of the trustees, may convert the same security or securities into money, or make any allowance out of his or her demand for the same to the satisfaction of the trustees, or, without such consent, may exercise any power of sale or other powers now vested in them respectively, and receive a dividend rateably with the other creditors on so much of the same demand or demands as shall not be satisfied out of the produce of the same security or securities, in the same manner as if the assignor had been duly adjudged bankrupt."

The learned judge directed a verdict for the plaintiff, holding that the release was limited by the proviso, and amounted only to a covenant not to sue, and consequently did not bar the remedy of a surety; but leave was reserved to the defendant to move to enter the verdict for him on the third plea.

Francis Turner, in Trinity Term last, obtained a rule nisi accordingly, against which

Quain, Q.C., and *Foard*, shewed cause. The plaintiff and defendant both stand in the position of sureties for Green, the acceptor of the bill. The release contained in the deed, to which the plaintiff was an assenting party, is not absolute, but subject to a proviso whereby the rights of sureties are reserved, and therefore amounts only to a covenant not to sue. The case falls precisely within the principle of *Solly* v. *Forbes* (1), *Kearsley* v. *Cole* (2),—which, though doubted by Lord Truro in *Owen* v. *Homan* (3), is now undoubted law,—and *Green* v. *Wynn*. (4)

Turner, in support of the rule. It is not necessary to dispute the authority of *Solly* v. *Forbes* (1) and *Kearsley* v. *Cole*. (2) In every case in which such a release as this has been construed to amount only to a covenant not to sue, the deed has contained provisions of a merely temporary character, the remedies of the creditors against the principal debtor being held in reserve, and not abandoned altogether; as in *Nicholson* v. *Revill* (5), where the debt was to revive on failure of the debtor to pay the composition.

---

(1) 2 B. & B. 38.

(2) 16 M. & W. 128.

(3) 3 Mac. & G. 378, 388.

(4) Law Rep. 7 Eq. 28; Law Rep. 4 Ch. 204.

(5) 4 A. & E. 675.

1871

BATESON v. GOSLING.

The deed in this case, however, contains an absolute assignment of all the debtor's estate, and, taking all its provisions together, amounts to an absolute release and extinguishment of the debts. The creditor gets something in exchange for his debt, which peradventure may be more than his debt; and the position of the surety is altered for the worse. The case, therefore, falls within the principle of *Webb* v. *Hewitt* (1), where Vice-Chancellor Wood lays it down that, when the creditor gives a release to the debtor, he cannot reserve any right against the surety, because the debt is gone at law. In *Green* v. *Wynn* (2), the deed was a simple assignment of the debtor's property in trust to realize and divide the proceeds amongst the creditors, reserving the remedies of the latter against sureties. Here, it impowers the trustees to carry on the trade of the debtor,—a speculative trade,—dealing with the estate as if it were their own, and for an indefinite time; the surety having no power to interfere. Under such circumstances, the reservation of the creditors' rights against sureties would be inconsistent, and of no effect.

WILLES, J. I am of opinion that the rule should be discharged. The plea is quite correctly framed. It alleges that the plaintiff, by a deed under the Bankruptcy Act, 1861, released the principal debtor, without reserving the right of the plaintiff to sue the defendant, the surety. The deed, when looked at, clearly amounts only to a release, subject to the proviso; and the proviso in terms reserves the remedy against the surety. The rule of law is clear, that, if there be two clauses or parts of a deed repugnant the one to the other, the first part shall be received and the latter rejected, except there be some special reason to the contrary. That rule was applied to a release in the case of *Solly* v. *Forbes* (3), where there was an express release given to one of two partners, with a proviso that it should not prejudice any claim which the releasors might have against the other partner. The Court held that the whole deed must be taken together, in order to effectuate the intention of the parties. "It is not," said Dallas, C.J., "an absolute and unqualified release, but in terms conditional and pro-

(1) 3 K. & J. 438.

(2) Law Rep. 7 Eq. 28; Law Rep. 4 Ch. 204.

(3) 2 B. & B. 38.

visional, being made subject to an exception; such exception forming part of the same sentence with the words of release, and immediately connecting with and attaching upon them:" and so the release was held to amount only to a covenant not to sue. A different consideration arose in the case of a surety, by reason of the rule that the surety is released by time being given to the principal debtor. Another consideration also arose in the case of principal and surety, by reason of the right of recourse: if the surety is made to pay, he would be entitled to be recouped by the principal. With reference to these two considerations much discussion has arisen. The former was rejected in *Kearsley* v. *Cole.* (1) In giving the judgment of the Court in that case, Parke, B., says: "It appears by my Brother Williams's note that the plaintiff and defendant both executed the deed, and the plaintiff solicited different creditors to become parties to it; consequently it must be assumed that he consented to the reserve of remedies; and the question is, what is the effect of a discharge with the reserve of remedies *consented to by the surety.*" But he goes on to say: "We do not mean to intimate any doubt as to the effect of a reserve of remedies *without such consent;* and the cases are numerous that it prevents the discharge of a surety, which would otherwise be the result of a composition with or giving time to a debtor by a binding instrument; and the reserve of remedies has that effect, upon this principle,—first, that it rebuts the implication that the surety was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction,—and, secondly, that it prevents the rights of the surety against the debtor being impaired, the injury to such rights being the other reason; for, the debtor cannot complain if the instant afterwards the surety enforces those rights against him, and his consent that the debtor shall have recourse against the surety is impliedly a consent that the surety shall have recourse against him. This is the effect of what Lord Eldon says in *Ex parte Gifford* (2) and *Boultbee* v. *Stubbs* (3) as to the reserve of remedies; and the general proposition that, with that recourse, the composition or giving time does not discharge the surety, is supported by those and the following

---

(1) 16 M. & W. 128.

(2) 6 Ves. 805.

(3) 18 Ves. 20.

1871

BATESON
v.
GOSLING.

cases,—*Ex parte Glendinning* (1), *Nichols* v. *Norris* (2), *Smith* v. *Winter* (3), and others. The point must, therefore, be considered as settled." Although this opinion of Lord Wensleydale seems to have been somewhat doubted by Lord Truro, in *Owen* v. *Homan* (4), it has been since adopted in *Price* v. *Barker* (5), and has been followed in terms in *Webb* v. *Hewitt* (6), and also in *Green* v. *Wynn.* (7) It must, therefore, now be taken to be settled, that, where the principal has entered into a deed of arrangement containing a release subject to the reservation of the creditor's right of recourse against the surety, the latter has no right to raise the objection. If, however, there is an absolute and unconditional release, the remedy against the surety is gone, because the debt is extinguished. The reason that the surety cannot in such a case be sued is, that it would be a fraud upon the rest of the creditors, as is pointed out in *Lewis* v. *Jones* (8), where there is a note by Mr. Cresswell (9), which has sometimes been erroneously attributed to Holroyd, J., in which the matter is very fully considered. In *Green* v. *Wynn* (7), by a mortgage-deed the debtor covenanted to pay principal and interest; and a surety covenanted to pay the interest, in default. The debtor afterwards by deed assigned his property to a trustee on trust to sell and divide the proceeds amongst his creditors; the creditors releasing the debtor from the debts due to them respectively; but there was a proviso in the deed that nothing therein should affect any right or remedy which any creditor might have against any other person in respect of any debt due by the debtor; and it was held that the deed only amounted to a covenant not to sue the debtor, and that the surety was not released. That was a much stronger case than *Nicholson* v. *Revill.* (10) It comes round therefore to this, that if there be an absolute release of the principal there can be no reservation of a right to proceed against a surety. The debt is gone. That is the substance and effect of the decision of Page Wood, V.C., in *Webb* v. *Hewitt.* (6) "As to giving time," he says (11), "the authorities, which are almost innumerable, have settled that upon any giving of time to a principal debtor, if there be a reservation of rights against the surety, the surety is not discharged; for, when the right is reserved, the principal debtor cannot say it is inconsistent with giving him time that the creditor should be at liberty to proceed against the sureties, and that they should turn round upon the principal debtor, notwithstanding the time so given him; for, he was a party to the agreement by which that right was reserved to the creditor, and the question whether or not the surety is informed of the arrangement is wholly immaterial. A release, however, stands upon an entirely different footing. The case of *Nicholson* v. *Revill* (1), which is recognized in *Kearsley* v. *Cole* (2), has decided that, when an actual release is given, no right can be reserved, for the debt is gone at law." His Honour then proceeds to give what is not quite an accurate representation of *Nicholson* v. *Revill* (1), nor altogether of *Kearsley* v. *Cole.* (2) It might be surmised that he had not in his mind the decision in *Solly* v. *Forbes.* (3) But he goes on to say (4): "There is neither a giving of time nor the mere circumstance of a release, but an actual sale. The debt is satisfied and gone. No part of the agreement is disputed. Field (the principal debtor) agrees to assign to Hewitt all his property; and on the face of this agreement (and there is no evidence to the contrary in the suit), there was no valuation made. It might or might not be that Hewitt would then get full satisfaction: it was not an assignment upon trust to pay Hewitt and the rest of the creditors five shillings in the pound. Probably it was estimated that the effects would pay five shillings only in the pound to Hewitt and the other creditors; but upon the face of the agreement Hewitt may be taken to have contemplated not only that his debt would be satisfied by having this property, but more than satisfied; for, he agreed on taking it to pay five shillings in the pound to the other creditors. It was in either view a complete sale. The debt is gone in equity; and it is impossible to reserve a right against the surety in such a transaction as that." No statement of the law can be more correct than that. The debt being gone, no right of recourse against the surety could be reserved. That case, therefore, is quite in accord-

---

(1) Buck's B. C. 517.
(2) 3 B. & Ad. 41.
(3) 4 M. & W. 454.
(4) 3 Mac. & G. 378, 388.
(5) 4 E. & B. 760; 24 L. J. (Q.B.) 120.
(6) 3 K. & J. 438.
(7) Law Rep. 7 Eq. 28; Law Rep. 4 Ch. 204
(8) 4 B. & C. 506.
(9) 4 B. & C. at p. 515.
(10) 4 A. & E. 675.
(11) 3 K. & J. at p. 442.

(5) S C 1 Jur NS. 775.

(1) 4 Ad. & E. 675.
(2) 16 M. & W. 128.
(3) 2 B. & B. 38.
(4) 3 K. & J. at p. 444.

ance with the current of the decisions. Is there, then, such a release in the present case? There are words which, if they stood alone, would amount to a release, but which are cut down by subsequent words to a covenant not to sue. The plea therefore was not proved. None of the difficulties suggested by Mr. Turner seem to me to arise. There was no sale of the debtor's property in satisfaction of his debts; but a mere authority to the trustee to realize the assets for the benefit of the creditors, paying over any surplus to the debtor. There was no extinguishment of the debt. The surety would be entitled to come in on paying the debt. That is only a carrying into effect the general right of a surety to be put in the place of the principal. No injustice is done by such an arrangement. I think the verdict must stand.

KEATING, J. I am of the same opinion. This action is brought upon a bill of exchange against one who stands in the position of a surety. The third plea sets up a release of the principle debtor. The question is whether that plea was proved. In order to support it the defendant put in a deed containing a release of the principal debtor, which in terms is made subject to a proviso the effect of which is to prevent its operating as an actual release, inasmuch as it reserves the right of recourse against sureties. Mr. Turner does not deny that the proviso would under ordinary circumstances have that effect; but he contends that, looking at the special terms of the deed, the assignment to the trustees amounts to payment and satisfaction of the debts; and, if so, that there can be no reservation of the creditors' rights against sureties. For this he mainly relies upon the power given to the trustees to carry on the business of the assignor in a manner involving risk. I cannot agree that the deed has that operation. If the assignment of the property had been accepted in satisfaction, Mr. Turner's contention might have been well founded. But here the surplus, after payment of the debts, is to go to the assignor. There is no satisfaction of the debt: and, if not, there is no absolute release. A long series of cases has established that it amounts only to a covenant not to sue. I therefore think the plea was not proved.

BRETT, J. If, upon the true construction of this deed, there had been an absolute release of the debtor and an extinguishment of the debts, I agree that the remedies against sureties would have been gone. But, if the proviso reserving the rights of creditors having security has the effect of reducing it to a covenant not to sue, the debt is not gone, and the remedy of the creditor against the surety remains. *Solly* v. *Forbes* (1) is a direct authority for that. If the duty of the trustees here had been to collect and realize the estate of the debtor in the ordinary way, Mr. Turner would not have contended that the deed amounted to an absolute release, because he would have been concluded by *Kearsley* v. *Cole.* (2) But he relies upon the provision for the carrying on of the business by the trustees, and so incurring trade risks. I cannot, however, agree with him that the mere fact of the trustees being impowered to carry on the trade, where it is no part of the deed that the business is to be for ever theirs, but there is a resulting trust as to the surplus (if any) in favour of the debtor, takes the case out of the rule laid down by all the authorities. It is, in truth, merely another mode of realizing the property for the benefit of the creditors. I therefore think Mr. Turner has failed to shew that there is such an absolute release as to extinguish the debt.

COLLIER, J. I am of the same opinion. The first question is whether the general tenor of the deed makes the clause of release operate as an extinguishment of the debt, or as a mere covenant not to sue. I am of opinion that the latter is the true result. It is true there are words of actual release; but they are qualified by the subsequent proviso. I therefore concur with the rest of the Court that the rule must be discharged.

Rule discharged.

Attorney for plaintiff: *J. B. Pittman.*
Attorney for defendant: *W. F. Stokes.*

(1) 2 B. & B. 38. (2) 16 M. & W. 128.

1871
Nov. 20.

TYSON *v.* THE MAYOR OF LONDON.

Compensation—Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *s.* 121—*London City Improvement Act*, 1847 (10 *&* 11 *Vict. c. cclxxx*), *s.* 34—*Six Months' Notice of intention to take Lands—Tribunal by which Compensation to be assessed—Interest of Tenant, whether to be regarded at Commencement or Expiration of the Six Months' Notice.*

By the Holborn Valley Improvement Additional Works Act, 1867 (30 & 31 Vict. c. lv.) s. 14, the provisions of the London City Improvement Act, 1847 (10 & 11 Vict. c. cclxxx.), and the Lands Clauses Consolidation Act, 1845, except the part of the latter Act with respect to the purchase and taking of lands otherwise than by agreement, are incorporated, except so far as the said provisions are repealed, altered, or varied by, or are inconsistent with the provisions of the Act. The London City Improvement Act gives certain special powers to the corporation, enabling them to take and use lands required for the purposes of the Act upon giving six months' notice of their intention to do so, and provides for the assessment, by a jury, of compensation to the persons whose lands have been taken.

Sect. 34 of the London City Improvement Act provides that all persons in the actual possession of any lands to be taken, as owners, leaseholders, tenants at will, or lessees for a year or for any shorter time, or otherwise, shall, at the expiration of six months from and after notice in writing from the corporation, peaceably and quietly deliver up possession of such lands, but no such possession shall be delivered up until such payment or deposit of purchase or compensation money shall have been made, as is directed by the Lands Clauses Consolidation Act, 1845.

The 121st section of the Lands Clauses Consolidation Act, 1845, provides that compensation to any person in possession of lands to be taken, and having no greater interest therein than as tenant for a year or from year to year, for the value of his interest, and for any loss or injury he may sustain, shall be determined by two justices.

Under the provisions of the special Acts the corporation gave six months' notice to the tenant of certain lands of their intention to take the same.

At the time of such notice being given, more than a year, but, at the expiration of such notice, less than a year, of the tenancy remained:—

Held, that for the purpose of determining whether the compensation to the tenant was to be assessed by a jury or by justices under the 121st section of the Lands Clauses Consolidation Act, the tenant's interest at the time of giving the notice, and not at its expiration, was to be considered, and that, therefore, he was entitled to have his compensation assessed by a jury.

MANDAMUS to compel the defendant to issue his precept for the assessment of compensation claimed by the plaintiff, and to take all the necessary steps to have such compensation duly assessed.

The facts were stated in a special case as follows:—

The plaintiff was, on the 25th of January, 1869, tenant of a

1871

TYSON
v.
MAYOR OF
LONDON.

house and premises in the parish of St. Bride's, London, under an agreement, dated the 24th of June, 1867.

By this agreement Edwin Nixon agreed to let, and the plaintiff agreed to take, the house and premises in question for the term of three years, from Midsummer-day, 1867, at the yearly rent of 24*l.*, payable quarterly.

Upon the 25th of January, 1869, the corporation of London, as promoters of the Holborn Valley Improvement Additional Works Act, 1867, served on the plaintiff a notice to treat for the said premises.

This document gave notice to the plaintiff that it was the intention of the corporation to take and use the plaintiff's house and premises for the purposes of the Act, and that the corporation were willing to treat with him for the purchase of his interest in the premises, and for the compensation to be made for the injury or damage, if any, that might be sustained by him on account of the execution of the Act. It also required the plaintiff, at the expiration of six months, to deliver up possession of the premises, and required him, within one month after the giving of the notice, to deliver particulars of his estate and interest in the premises, and the amount of his claim for the value of such estate and interest, and compensation for injury or damage.

Upon the 19th of February, 1869, the plaintiff sent to the corporation a statement of the amount of his claim, and the nature of his interest in the premises.

The plaintiff and the corporation did not agree as to the amount of the compensation.

The question for the Court was whether the plaintiff was entitled to maintain the action. (1)

---

(1) By 10 & 11 Vict. c. cclxxx (The London City Improvement Act, 1847), s. 1, the Lands Clauses Consolidation Act is incorporated so far as the provisions thereof are not expressly varied by or excepted from the Act.

By s. 19 so much of the Lands Clauses Consolidation Act, 1845, as relates to the purchase of land, otherwise than by agreement, is not to be incorporated.

By s. 13 it is enacted as follows:—"For the purposes of this Act it shall be lawful for the mayor, aldermen, and commons, and they are hereby authorized and empowered, to take and use, or cause to be taken and used, any lands, and pull down and remove, or cause to be pulled down and removed, any houses or buildings, which they may deem necessary or expedient to take, use, or pull down and remove, for the purposes of this Act at any time, at the expira-

1871

TYSON
v.
MAYOR OF
LONDON.

W. G. Harrison, for the plaintiff. The period at which the notice to treat was given is that which must be looked to for the purpose of determining whether the case comes within the 121st

---

tion of six months after notice in writing from the mayor, aldermen, and commons, or their agent, duly authorized, of the intention to take or use the same, shall have been left at the principal office of business, or given to the principal officer of the corporation interested in or entitled to or by this Act enabled to sell and convey any such lands, houses, or buildings, or to the person who shall be the owner and occupier thereof, or have been left at his usual or last known place of abode or business, or with the tenant or occupier of the same lands, houses, or buildings, or have been affixed upon some part of such lands, houses, or buildings."

By s. 20 it is provided that within one month after notice of the intention to take or use any land for the purposes of the Act, the parties interested in the land shall deliver a statement of their interest and of the amount of compensation they claim.

By s. 21 it is provided that when the parties refuse to accept the satisfaction offered or to treat, the lord mayor shall issue a precept for impanelling a jury to assess the amount of the compensation.

Sects. 22-33 likewise contain various provisions relating to compensation for lands taken under the Act.

By s. 34 it is enacted as follows:—"All persons in the actual possession of any lands to be taken or purchased by virtue of this Act, as owners, leaseholders, tenants at will, or lessees for a year, or for any shorter time, or otherwise, shall at the expiration of six months from and after notice in writing from the mayor, aldermen, and commons, or their agent, duly authorized, shall have been left at or affixed upon the premises, or as soon after as they shall be required so to do, peaceably and quietly deliver up the possession of the said premises to the mayor, aldermen, and commons, or the person authorized by them to take possession thereof . . . but no such possession shall be delivered up until such payment or deposit of purchase or compensation money shall have been made, as is directed by the Lands Clauses Consolidation Act, 1845."

By s. 14 of the Holborn Valley Improvement Additional Works Act (30 & 31 Vict. c. lv), all the provisions of the London City Improvement Act, except ss. 3, 19, 42 to 45, and 50 to 55 inclusive, and of the Lands Clauses Consolidation Act, except the part with respect to the purchase and taking of lands, otherwise than by agreement, are incorporated, except so far as the said provisions are repealed, altered, or varied by or are inconsistent with the provisions of the Act.

Sect. 121 of the Lands Clauses Consolidation Act provides that compensation to any person in possession of lands to be taken, and having no greater interest than as tenant for a year or from year to year, for the value of his interest and for any loss or injury he may sustain, shall be determined by two justices. It was held in *Reg.* v. *Mayor of London* (Law Rep. 2 Q. B. 292), that that section was incorporated with the Holborn Valley Improvement Act, which incorporates the London City Improvement Act and the Lands Clauses Consolidation Act in terms very nearly the same as those of the Holborn Valley Improvement Additional Works Act.

section of the Lands Clauses Consolidation Act. The notice to treat binds the lands from the time when it is given: the owner cannot have any claim for increased value after that time. There is then what is equivalent to a contract for purchase created: Hodges on Railways, 5th ed. p. 207; *Marquis of Salisbury* v. *Great Northern Ry. Co.* (1); *Stebbing* v. *Metropolitan Board of Works* (2); *Morgan* v. *Metropolitan Ry. Co.* (3)

[WILLES, J. You contend that the intention of the special Act is that the occupier of the premises shall be in the same position as if a notice were given under the Lands Clauses Consolidation Act, except that he is to have six months' time in which to turn himself round and get other premises.]

The time of the giving of the notice is the time to be taken with reference to all questions of compensation.

Thesiger, for the defendant. The sole question is whether the point of time to be taken for ascertaining which tribunal is to determine the compensation is the commencement or expiration of the six months' notice to take. Under the Lands Clauses Consolidation Act it is the quantum of interest to be taken that regulates the question which tribunal is to adjudicate. Under that Act, upon the notice to treat being given, there no doubt arises the relation of vendor and purchaser in respect of the then existing interest of the party claiming compensation in the lands: *Sparrow* v. *Oxford, &c., Ry. Co.* (4) Under the special Act in this case, if the same principle is to be applied, the expiration of the notice is the period to be looked to. The interest which is taken commences at that period: the relation of vendor and purchaser is created with relation to that interest. The lands are undoubtedly bound from the date of the notice, just as lands are bound by a contract to purchase in future. There may be claims for compensation for damage sustained by reason of the execution of the works which may not be confined to the period subsequent to the expiration of the notice; but they have no connection with the quantum of interest to be taken.

[BRETT, J. It is worthy of observation that by the 34th section

---

(1) 17 Q. B. 840; 21 L. J. (Q.B.) 185.

(2) Law Rep. 6 Q. B. 37.

(3) Law Rep. 3 C. P. 553; Law Rep. 4 C. P. 97.

(4) 9 Hare, 437, 443; 21 L. J. (Ch.) 731.

1871

TYSON
v.
MAYOR OF
LONDON.

of the special Act, the entry on the lands is not to take place until after payment or deposit of the purchase-money or compensation.] That has no bearing on the question what amount of interest is taken, and what tribunal is to adjudicate upon the amount of compensation.

W. G. Harrison was not called on in reply.

WILLES, J. I am of opinion that the plaintiff is entitled to our judgment in this case. Mr. Thesiger's argument has not satisfied me that any distinction exists in the defendant's favour between this and the ordinary case of a notice to treat by reason of this being a notice to give up possession at the end of six months. We might, as it appears to me, proceed upon the fact that this notice to give up possession incorporated a notice to treat. Since the case of *Morgan* v. *Metropolitan Ry. Co.* (1), however, it must, I think, be taken to have been decided that where under the section now under consideration, or similar sections, a notice to take at the end of six months has been given, this amounts to a notice to treat, or according to the opinion expressed by the Lord Chief Baron, which appears to me as at present advised the preferable view, must be treated as involving the obligation to give a notice to treat. I do not therefore found my judgment on the form of this particular notice. That would be, I think, to take a narrow view of the case, and would leave the question still open in the case of a six months' notice of intention to take not including a notice to treat. My own impression is, that in such a case the notice to treat when given would have relation to the time at which a notice had been given, that the land was to be taken compulsorily under the provisions of the Act. That notice, when it is given, whether it be in such a form as to include a notice to treat or not, has an equally binding effect on the parties concerned. It is not to be treated as merely an intimation that the promoters will take, if they afterwards make up their minds to give a notice to treat. That being so, it appears to me that the period of giving such notice is the period to which all questions relating to the right to compensation must be referred. If the case of *Morgan* v. *Metropolitan Ry. Co.* (1) be good law, it is clear that after that notice the tenant of the

(1) Law Rep. 3 C. P. 553; Law Rep. 4 C. P. 97.

premises would be entitled to leave them and procure other premises, and incur various expenses and losses, which would properly be the subject of compensation, and in respect of such matters it would be impossible to deny that the right to compensation is to be referred to a period previous to the expiration of the six months. If that be so, I do not see why all matters relating to compensation should not have reference to that period, inasmuch as there is no distinction drawn in the Act between any such matters.

As far as the 121st section of the Lands Clauses Consolidation Act is concerned, apart from the provisions of the special Act, there is no doubt that the estate or interest of the party seeking compensation must be regarded at the time of giving the notice to take. If the same rule is applicable to the present case, notwithstanding the additional provision of the special Act, that the tenant is to have a certain time within which to give up possession, it is clear that the plaintiff is entitled to our judgment, for he had, at the time of such notice, an interest exceeding a year. The question then arises, whether the provisions of the London City Improvement Act make any difference. The section on which this question chiefly depends is the 34th section. Now it must be observed that that section has no peculiar reference to tenants for a year, or from year to year. It refers to freeholders and leaseholders as well as such tenants. It is a provision intended for the convenience of all persons whose lands are to be taken, to prevent their being suddenly disturbed in the enjoyment of their property, and it is also for the benefit of the corporation to facilitate their obtaining possession of the lands to be taken, but it relates only to the possession of the lands. The effect of it is expressly confined to persons in actual possession. Such possession is only to be given up on payment or deposit of the purchase or compensation money, in accordance with the Lands Clauses Consolidation Act. It appears to me that the section leaves all questions relating to compensation in respect of the tenant's interest entirely untouched. The result seems to be that, inasmuch as the plaintiff had more than a year's interest at the period which must be looked to for determining questions relating to compensation, he is entitled to have his compensation assessed by a jury.

KEATING, J. I am of the same opinion. It seems to me that

1871

TYSON
v.
MAYOR OF
LONDON.

the point of time, with reference to which the tenant's interest is to be determined, is the date of the notice to take the lands. In this case it happens that the notice to treat was embodied in the notice to take; but I think our judgment should be the same if that circumstance did not exist, for, according to the decision in the case of *Morgan* v. *Metropolitan Ry. Co.* (1), when a notice to take has been given, the parties giving it can be compelled to proceed to treat, and have the compensation assessed if necessary. It was argued that the effect of the 34th section of the special Act was to fix the date of the expiration of the six months' notice as the period at which the amount of the tenant's interest was to be determined for the purposes of the 121st section of the Lands Clauses Consolidation Act. It appears to me that the section relates only to the taking possession of the premises. The lands are bound from the date of the notice, and the section contemplates that all necessary steps to complete the matter will be taken and the compensation will actually be assessed before the expiration of the six months.

BRETT, J. I am of the same opinion. The 34th section of the special Act, as it appears to me, deals only with the time of taking possession, leaving all other questions relating to compensation to be dealt with on the same footing as in ordinary cases of compensation under the Lands Clauses Consolidation Act.

COLLIER, J. I am of the same opinion. By the 121st section of the Lands Clauses Consolidation Act, a period of twenty-one days may be interposed between the service of the notice and the proceeding to assess disputed compensation; but I apprehend that, nevertheless, the interest of the party to be compensated is to be considered as it existed at the time of the giving of the notice. In the same manner, in the present case, the six months' postponement of possession makes no difference as to the principle of the assessment of compensation, which must be ascertained with reference to the time at which the notice to take was given.

Judgment for the plaintiff.

Attorney for plaintiff: *Blewitt.*
Attorney for defendant: *Nelson.*

---

(1) Law Rep. 3 C. P. 553; Law Rep. 4 C. P. 97.

THE NORTH BRITISH AND MERCANTILE INSURANCE COMPANY v. MOFFATT AND ANOTHER.

1871
Nov. 25.

7 QB 446
457, 462
8 CP 599
5 ChD 579

Policy of Fire Insurance—Insurable Interest—"Merchandise in Trust or on Commission for which the Assured are responsible"—Loss.

A policy of fire insurance expressed the insurance to be on "merchandise the assured's own, in trust or on commission for which they are responsible" in or on certain specified warehouses, vaults, wharves, &c. Whilst the policy was in force certain chests of tea, on a wharf included in the policy, were destroyed by fire. These teas had been deposited in bond by the importer with the wharfinger; the assured had purchased them from the importer, and the warrants had been indorsed in blank by him to the assured. Before the fire occurred the assured had resold the teas in specified chests to customers, and had been paid for them; they held, however, the warrants on behalf of the customers, but merely for the convenience of paying, if required, the charges necessary for clearing the teas payable by such customers:—

Held, that the policy applied only to goods belonging to the assured, or for which they were responsible, and the property in the teas having, at the time of the fire, passed to the purchasers, they were then at the purchasers' risk, and were consequently not covered by the policy.

THIS was an action brought by the plaintiffs to recover from the defendants a sum of 636*l.* 13*s.* 7*d.*, which the plaintiffs alleged to have been paid by them to the defendants in excess of the sums due on certain policies of insurance, and which the defendants had agreed to repay to the plaintiffs in the event of that allegation being well founded.

By consent of the parties a case was stated for the opinion of the Court, without pleadings, the substance of which is as follows:—

The plaintiffs are an insurance company, and the defendants are wholesale tea merchants, carrying on business in the city of London. In the year 1865 the defendants effected two policies of insurance with the plaintiffs, by which the plaintiffs, in consideration of an annual premium, insured from loss or damage by fire, as from the 29th of September, 1865, subject to conditions in the policies contained, to an amount not exceeding on each policy 3500*l.*, "merchandise (jute, petroleum, and its products excepted) the assured's own, in trust or on commission for which they are responsible, in or on all or any of the warehouses, vaults, cellars, sheds, crane-houses, wharves, yards, or quays belonging to, and if not under the protection of a marine policy on board any vessel or craft at," certain wharves in the said policies mentioned.

Among these wharves was one called Beal's Wharf, mentioned in both the policies.

On the 30th of October, 1865, and while the policies were in force, a fire occurred at Beal's Wharf, and by that fire certain chests of tea, which had been, and then were warehoused there in manner hereinafter mentioned, were either consumed or damaged. The defendants thereupon made a claim under the policies in respect of those chests of tea. The plaintiffs were not satisfied as to their liability to the whole extent of the claim so made, but paid the whole amount on the defendants entering into the above-mentioned agreement to repay any sum which might be found to have been overpaid. The teas damaged or destroyed by the fire were of two classes. In respect of one class the plaintiffs admitted their liability, and did not seek to recover any portion of the sum that had been paid in respect of them.

The second class, in respect of which the repayment of the sum of 636*l.* 13*s.* 7*d.* was claimed, consisted of teas which had been warehoused at Beal's Wharf, and which had been sold by the defendants before the time of the fire, and the following were the facts relating thereto:—The teas had been originally deposited in bond with the wharfingers to whom Beal's Wharf belonged, by the importers thereof, to whom the wharfingers issued warrants in respect thereof. The warrant is a document acknowledging that certain chests of tea therein specified are deliverable to the person named therein or his assigns by indorsement, and the bearer giving a receipt for the same. Upon a warrant indorsed by the person named therein being presented by any one to the wharfingers, and upon the person presenting it signing a receipt for all or any part of the teas contained therein, and upon payment of the duty and rent due thereon, if any, the wharfingers deliver to him the tea for which the receipt is signed. It is not the practice to deliver any of the teas mentioned in the warrant without the production of it. The wharfinger knows nothing of the actual ownership of the teas, but acts upon the production of the warrant duly indorsed. The defendants had purchased the teas from the importers, who duly indorsed the warrants in blank and delivered them to the defendants.

Before the date of the policies, under which the claim of the defendants was made, the defendants had sold to various customers the whole of the teas included in the said second class. All the sales were of certain specified chests, and were made by sample, and the contracts of sale were verbal and not reduced to writing. The terms of such sales were for three months open credit, or for cash subject to discount. The purchasers had power to pay at any time within the three months, deducting discount for the time not expired of the said credit of three months.

A further term on such sales was that all rent due to the wharfingers in respect of the teas comprised in such sales up to the time of the expiration of the said credit should be borne by the vendors, and all rent becoming due subsequent to that date, and also the custom-house duties, should be borne by the purchasers.

Shortly after each of the said sales by the defendants, and before the expiration of the period of credit, they sent to each purchaser an invoice stating, among other things, the weights, marks, and numbers of the chests bought by him, and the price payable in respect thereof. The period of credit of all the teas of the second class had expired, and the price been paid to the defendants before the fire occurred.

The ordinary course upon sales by the defendants was not to deliver the warrants to the purchasers but to retain the said warrants in their own possession on behalf of the purchasers, and to perform for the purchasers as and when required by them whatever was necessary to get the teas cleared and delivered, that is to say, to pay the custom-house duties and rent due in respect of the goods.

This course was pursued with respect to the teas included in the second class, and at the time of the fire all the warrants for the teas then belonging to purchasers remained in manner and for the purposes aforesaid in the hands of the defendants, as the defendants had not then been required by the purchasers to clear or deliver them to or on behalf of such purchasers. The carriage of the goods was paid by the purchasers.

The wharfingers never received any notice of the sale of the teas

1871

NORTH BRITISH INSURANCE CO. v. MOFFATT.

to the defendants by the importers, or of the sales by the defendants to the purchasers from them.

There was due to the wharfingers in respect of each of the chests comprised in the said second class a sum of money as rent for warehousing the same after the purchase thereof by the defendants and before the sale thereof by the defendants to their customers, which rent was unpaid at the time of the said sales and said fire, and was a charge upon the said teas to be paid by the person claiming delivery thereof prior to delivery by the said wharfingers.

The defendants previous to the fire had made entries in their own books appropriating to each customer the specific chests of tea bought by him, and had written on each warrant the name of the purchaser of the teas therein comprised.

The defendants had no contract with the purchasers to insure the teas against loss or damage by fire, or to be repaid by the purchasers any premiums in respect of such insurance, nor had the defendants in fact charged the purchasers with any such premiums. The defendants after the fire, voluntarily and without the knowledge of the plaintiffs, paid to the purchasers the value of the teas in various sums, making together the sum of 636*l.* 13*s.* 7*d.* The question for the Court was whether the defendants were entitled under the policies to be paid by the plaintiffs the said sum of 636*l.* 13*s.* 7*d.* in respect of loss or damage caused by the said fire to the said teas included in the second class.

Nov. 9. *H. Matthews, Q.C.* (*Holl*, with him), for the plaintiffs. The teas in question were not the property of the assured. The property in them had passed to the purchasers. The defendants had not even a special property in them. The warrants were only retained by the defendants on the purchasers' behalf, in order that they might do what was necessary for the purpose of clearing the teas. The purchasers might call for the warrants at any moment, and the defendants would be bound to give them up. Neither were these goods held in trust by the defendants; they were under no responsibility in respect of them. The true construction of the policy is that the words "for which they are responsible," apply both to goods "in trust" and "on commission." The obvious intention of the policy is, that the insurance should only be on goods, the loss of which would cause damage to the assured. The defendants could suffer no damage by the loss of these teas, and, consequently, had no insurable interest in them.

[He cited *Seagrave* v. *Union Marine Insurance Co.* (1); *Waters* v. *Monarch Life and Fire Assurance Co.* (2); *London and North Western Ry. Co.* v. *Glyn* (3); *Powles* v. *Innes* (4).]

Sir J. B. Karslake, Q.C. (*Watkin Williams* and *Underdown* with him). The words "for which they are responsible," in the policy, only apply to those immediately antecedent, viz., "on commission." These goods come within the expression "in trust." The warrants, which represent the possession of the goods just as the key of a warehouse in which goods are deposited would, were still in the defendants' possession. They had duties in the ordinary course of business to perform in respect of the goods, for the purpose of enabling the purchasers to receive delivery. It is not necessary in such a case in order to have an insurable interest, that the persons interested should be responsible for the goods. Though there was no obligation to insure, the assured would be trustees of the amount recovered on the policies for the owners. See *Waters* v. *Monarch Life Assurance Co.* (2); and *London and North Western Ry. Co.* v. *Glyn.* (3) These policies must be read in connection with the nature of the tea trade. It would be impossible to insure goods at all under the circumstances in this case, unless they are held to be covered by a policy of this description. The interests in the teas are constantly shifting. These are intended to be floating policies kept up for the benefit of the parties who may become interested in the goods insured.

Cur. adv. vult.

Nov. 25. The judgment of the Court (Willes, Keating, and Brett, JJ.) was delivered by

KEATING, J. This was a special case, stated between the parties, for the purpose of having it decided whether the plaintiffs can recover from the defendants a sum of 636*l.* 13*s.* 7*d.*, alleged by them to have been paid to the defendants in excess of the sums due

---

(1) Law Rep. 1 C. P. 305, 320.
(2) 5 E. & B. 870; 25 L. J. (Q.B.) 102. 2 Jur. N.S. 375.
(3) 1 E. & E. 652; 28 L. J. (Q.B.) 188, 192. 5 Jur. N.S. [illegible]
(4) 11 M. & W. 10.

1871

NORTH BRITISH INSURANCE CO. *v.* MOFFATT.

on certain policies of insurance, and which the defendants agreed, in the event of that allegation being well founded, to repay to the plaintiffs.

The policies in question were dated the 13th of October, 1865, and in consideration of an annual premium the plaintiffs insured from loss or damage by fire the property thereinafter described, "not exceeding the sum specified as applicable to the several articles, viz., 3500*l.*, Three thousand five hundred pounds, on merchandize (jute, petroleum, and its products, excepted), the assured's own, in trust, or on commission, for which they are responsible, in or on all or any of the warehouses, vaults, ships," &c., or other places specified, and certain wharves, including Beal's Wharf.

Whilst the policies were in force a fire occurred at Beal's Wharf in the policy mentioned, and consumed certain chests of tea, which form the subject of the present litigation. Those teas had been deposited in bond by the importer with the wharfinger to whom Beal's Wharf belonged, and who issued warrants for the same, deliverable to the depositor or his assigns, by indorsement thereon. The defendants had purchased the teas from the importer, who indorsed to them the warrants in blank. The defendants before the fire occurred had resold the teas in specified chests to customers, and had been paid for the same; they held, however, the warrants on behalf of such customers, but merely for the convenience of paying, if required to do so, the charges necessary to clear the teas, such as custom-house dues and rent, payable by the vendees. Under these circumstances, therefore, stated in the present case, we are of opinion, that before and at the time of the fire, the property in the teas had passed to the vendees, and that the teas remained at their risk, and not at the risk of the defendants, who had no longer any interest in them, or responsibility to the vendees in respect of them in case of fire.

But it was contended on behalf of the defendants that even supposing that to be the case, still the policy, being a floating policy, covered the goods in question as goods in trust, and that, therefore, the defendants were liable to pay their full value, and the cases of *Waters* v. *Monarch Insurance Co.* (1) and *London and*

---

(1) 5 E. & B. 870; 25 L. J. (Q.B.) 102. 2 Jur NS 375

North Western Ry. Co. v. *Glyn* (1) were relied on in support of that contention. In those cases, goods held by the plaintiffs as bailees were insured by them under policies the conditions of which provided that goods held in trust would not be covered by the policies unless they were insured as such. The goods accordingly were insured expressly as goods held in trust by the assured. The offices contended, that as the plaintiffs, as bailees, had no insurable interest in the goods beyond their liens respectively, they could only recover to the amount of such liens. But the Court held in each case that the plaintiffs were entitled to recover to the full amount insured, and intimated that the excess beyond the personal interest of the assured would probably be held in trust for the parties really interested, though unaware of the insurance having been effected. If, therefore, the words in the present policy had been similar to those in the policies referred to, we should have thought the cases were authorities in favour of the defendants' view, notwithstanding that they had no interest even amounting to a lien upon the goods in question; but it will be observed the wording in the present policy is essentially different, for whilst in the cases referred to the insurance extended to "goods in trust or on commission" generally, in the present case it is expressly limited to "goods in trust or on commission, for which they (the assured) are responsible." In *London and North Western Ry. Co.* v. *Glyn* (1), Erle and Hill, JJ., had thrown out that if insurance companies wished in future to limit their responsibility to the responsibility of the assured, they must employ express words to that effect. It seems to us that the present plaintiffs have done so in this policy, and have expressly limited their liability to such goods as were held in trust by the assured, and for which they were responsible. It follows that the goods in question for which the assured were not responsible were not covered by the policy, and consequently that the plaintiffs are entitled to the judgment of the Court.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Clements.*
Attorneys for defendants: *Willoughby & Cox.*

(1) 1 E. & E. 652; 25 L. J. (Q.B.) 188.

PAPPA *v.* ROSE.

1871
Nov. 3.

Arbitration—Broker made Referee to determine whether or not Goods are of the Quality contracted for.

LR 8 CP.
5, 6, 7, 8, 9.
9 CP 59
4CPD. 153.
154 - 162

The defendant, as broker, made a contract for the plaintiff, as follows:—"Oct. 26, 1869. Sold by order and for account of Mr. D. Pappa, to my principals, Messrs. S. H. & Son, to arrive, 500 tons Black Smyrna raisins—1869 growth—fair average quality in opinion of selling broker—to be delivered here in London—at 22*s.* per cwt. D. pd. Shipment, November or December, 1869," &c.:—

Held, that the defendant was in the nature of an arbitrator to determine between the parties any difference which might arise as to the quality of the raisins tendered in fulfilment of the contract; and, consequently, that he was not liable to an action for not having exercised reasonable care and skill in coming to a decision,—it being conceded that he had acted bonâ fide and to the best of his judgment.

Quære, whether the contract was satisfied by the tender of raisins of "fair average quality" generally, or whether it required that they should be of fair average quality of the growth of 1869?

Affirmed post 525

The first count of the declaration stated that the plaintiff retained and employed the defendant, as selling broker, for reward payable by the plaintiff to the defendant in that behalf, to sell certain goods for the plaintiff, to wit, raisins, upon the terms of a certain sale-note in the words and figures following, that is to say, "29 Mincing Lane, London, 26 October, 1869. Sold by order and for account of Mr. D. Pappa, to my principals, Messrs. S. Hanson & Son, to arrive, 500 tons Black Smyrna raisins—1869 growth—fair average quality in opinion of selling broker—to be delivered here in London—at 22*s.* per cwt. D. pd. Shipment, November or December, 1869. If not delivered, buyer to be allowed 1*s.* per cwt. In bags. Bags included in weight. Customary allowances. Discount 1%. Prompt two months from date of final landing:" and in consideration thereof the defendant promised the plaintiff that he the defendant would use due care, skill, and diligence in and about the said sale by the defendant, and in acting as the selling broker within the meaning of the contract, and in and about sampling and examining the goods in order to form a just and correct opinion of the same, within the meaning of the contract, and in declaring the same as between the plaintiff and the buyer: That the defendant accepted the retainer and entered upon the employment; and that all conditions precedent were fulfilled, &c., to entitle the plaintiff to have the defendant exercise due care, skill, and diligence in sampling and examining the goods in order to form a just and correct opinion of the same, and in declaring the same as between the plaintiff and the buyer, and to sue the defendant for the breach thereinafter complained of: Yet the defendant so unskilfully and negligently conducted himself in and about the sampling and examining the goods, and in forming and declaring his opinion thereon, that, although the goods were Black Smyrna raisins of 1869 growth, fair average quality, yet the defendant declared his opinion that the same were not of fair average quality within the meaning of the contract; by reason whereof the buyers of the goods refused to accept delivery of them, and the plaintiff was unable to enforce the contract of sale against the buyers.

Second count, that the plaintiff retained and employed the defendant as selling broker to sell certain goods for the plaintiff as and upon the terms in the first count mentioned; that the defendant accepted the retainer and entered upon the employment, and, in consideration thereof, promised the plaintiff that he would carefully examine the goods, and would exercise his judgment justly and fairly in order to form and declare his opinion thereon, as selling broker, within the meaning of the contract: Averment of performance of all conditions precedent, &c.: Breach, that the defendant did not carefully examine the goods, nor exercise his judgment justly and fairly thereon, and, although the goods were Black Smyrna raisins, 1869 growth, of fair average quality, the defendant declared that in his opinion they were not fair average quality; whereby the plaintiff suffered damage as in the first count mentioned.

Pleas,—1. That the plaintiff did not retain and employ the defendant as selling broker, and he did not promise as alleged. 2. A denial of the breaches.

Issue thereon.

The cause was tried before Bovill, C.J., at the sittings in London after Hilary Term last. The making of the contract set out in the declaration, by the defendant, as selling broker, was proved. It was also proved that, on the 17th of December, 1869, certain

1871

PAPPA v. ROSE.

Black Smyrna raisins ex *Persian*,—the first shipment of the season,—having been offered in part fulfilment of the contract, the defendant, after examining the bulk, gave the following certificate:—"I have carefully inspected the bags Black raisins ex *Persian*, lying at Red Lion and Three Cranes Wharf, marked S. N. I am sorry to find I must reject them, as they are not fair average quality of 1869 growth;" and that, on the 10th of February, 1870, certain other raisins ex *Propontis* and *Arabian* having been tendered by letter of the plaintiff dated the 9th, the defendant certified as follows:—"I am sorry to say I must decline to pass the Black raisins therein offered in fulfilment of my contract dated 26th October last, they not being fair average quality of 1869 growth."

Several witnesses (fruit-brokers) were called, who proved that the raisins offered in fulfilment of the contract were not of "fair average quality," and therefore were properly rejected. But it was contended on the part of the plaintiff that the article contracted for was fruit of "fair average quality, of the growth of 1869;" and there was evidence to shew that the growth of Black Smyrna raisins of 1869 was exceptionally bad, and that the raisins tendered were fair average of that particular year's growth.

There was no evidence to shew that there was any recognized standard by which to estimate the fair average quality of Black Smyrna raisins generally, or the average of any given number of years,—they being an article of very limited demand in the London market, and no samples of the different years' growths being kept.

For the defendant, it was submitted, that the true meaning of the contract was, that the fruit should be of "fair average quality" generally, and that the defendant, having acted in the matter as an arbitrator or quasi arbitrator, was not responsible, provided he had acted bonâ fide.

On the part of the plaintiff it was insisted that the contract was satisfied by the tender of Black Smyrna raisins of fair average quality of the growth of 1869; and that the defendant, as selling broker, not having brought due and reasonable care and skill to the examination of the raisins tendered, was liable in damages for having improperly rejected them.

1871

PAPPA
v.
ROSE.

The Chief Justice ruled that the "fair average quality" in the contract meant fair average quality generally, and not of the year 1869; and that an action would not lie against the defendant, inasmuch as he acted as a judge or abitrator in deciding on the quality of the raisins,—provided he acted bonâ fide: and he thereupon nonsuited the plaintiff.

It was agreed that a new trial should be granted only if the Court should be of opinion that his Lordship's ruling was wrong upon both points; and that the unsuccessful party should have leave to appeal.

Sir J. B. Karslake, Q.C., in Hilary Term last, obtained a rule nisi.

Giffard, Q.C., Murphy, and *Howard Smith,* shewed cause. The construction put upon the contract by the Chief Justice, at the trial, was clearly correct, whether it be taken grammatically or with reference to the surrounding circumstances. The plain meaning of the parties was that the raisins should be of fair average quality. It is true that they are to be of the growth of 1869; but that stipulation does not alter the substance of the contract, which is for "Black Smyrna raisins of fair average quality." The shipments were to be of November and December, 1869. The average of that year's arrivals could not then be known, inasmuch as the average must be ascertained by a comparison of all the shipments of the season. Then, the action is one which cannot be maintained. The defendant, in determining on the quality of the raisins, was not acting in the capacity of broker. He was an arbitrator employed to decide between the parties whether or not the quality of the fruit was such as to satisfy the terms of the contract. It is enough to say that, in the absence of mala fides, no action will lie against a person so appointed. *Jenkins* v. *Betham* (1), which was cited at the trial, was a totally different case. The defendant there was employed, not as a referee, but as a valuer, to value certain dilapidations on the part of the plaintiff. He was bound to bring to the work he undertook to do a competent degree of skill and knowledge. In this he failed; and therefore he was properly held liable. Here, however, a certain matter of controversy was referred for the

(1) 15 C. B. 168; 24 L. J. (C.P.) 94. 1 Jur. N.S. 237.

decision of the defendant, and that decision was to be final between the parties. He was, in truth, exercising the functions of a judge.

Sir J. B. Karslake Q.C., *Sir G. Honyman, Q.C.*, and *Watkin Williams*, in support of the rule. These mercantile contracts are not to be construed according to the strict rules of grammar. Reading this contract as any mercantile man would read it, it is free from ambiguity. The raisins are to be of the growth of 1869, and of fair average quality; that is, they are to be of the fair average quality of the growth of 1869. All the witnesses were agreed that the raisins tendered answered that description. It is not necessary to wait until all the shipments of the season have arrived, in order to ascertain what is the fair average quality of the growth of the particular year. The condition and prospects of every crop,—whether of grain, of cotton, or of fruit,—is well known long before the shipments can arrive in this country. There is not, and cannot from the nature of the thing be, any such thing known in this trade as "fair average quality" generally, as in the case of grain, wool, cotton, bacon, or the like, as to which there is a known standard in the particular trade. The certificates given by the defendant shew that he himself understood the contract to mean "fair average of the growth of 1869." He was employed by the plaintiff to draw the contract, to take samples of the raisins, and to examine them and form a judgment as to whether or not they answered the description in the contract. He was bound to bring a reasonable degree of skill and knowledge to the performance of these three things. For a failure through negligence or unskilfulness in the performance of two of these duties, he would unquestionably be liable: *Harmer* v. *Cornelius* (1); Chitty on Contracts, 7th ed. 505. Why should he not be liable for failure as to the third? It was one of the things which he as selling broker by the terms of the contract bound himself to do. He could not refuse to perform either of them.

[BRETT, J. Would the chairman of the Cotton Brokers' Association of Liverpool, to whom a matter in difference is referred under the ordinary cotton contracts there, be liable to an action for a mere failure to exercise a correct judgment upon it?]

That is clearly a case of arbitration. But "it is not in every case where two parties intend to be concluded by the decision of a third that that third person is an arbitrator:" Russell on Arbitration, 3rd ed. 42, 4th ed. 38.

---

(1) 5 C. B. (N.S.) 236; 28 L. J. (C.P.) 85. 4 Jur NS 1110

KEATING, J. This is an action by the plaintiff against the defendant, a broker in London, for unskilfulness in the discharge of his duty as such broker, whereby the plaintiff has sustained damage. On the 26th of October, 1869, Rose, the defendant, as selling broker, made a contract between the plaintiff and Messrs. Hanson & Son in the following terms:—"Sold by order and for account of Mr. D. Pappa, to my principals, Messrs. S. Hanson & Son, to arrive, 500 tons Black Smyrna raisins—1869 growth—fair average quality in opinion of selling broker—to be delivered here in London—at 22*s.* per cwt. D. pd. Shipment November or December, 1869. Prompt two months from date of final landing." At the trial before the Chief Justice, the plaintiff gave evidence to shew that the defendant, who had refused to pass certain raisins tendered in fulfilment of the contract, as not being "fair average quality of 1869 growth," had not exercised reasonable and proper skill in arriving at that conclusion: and several fruit-brokers were called to shew that the raisins tendered were not of fair average quality, and ought not to have been passed. The Chief Justice nonsuited the plaintiff, on two grounds. In the first place, he was of opinion that the words "fair average quality" in the contract meant "fair average quality generally," and not "fair average quality of the growth of 1869." If that be the true construction of the contract, the plaintiff failed to support his declaration. But, further, my Lord was of opinion, that, according to the terms of the contract and the evidence given in the cause, the defendant was in the position of an arbitrator,—not of an arbitrator in the ordinary acceptation of the term, but of a quasi arbitrator; that he was by agreement of the parties to finally decide a matter in dispute between them: and upon that ground also the nonsuit proceeded. The question for our consideration is, whether my Lord was right in nonsuiting the plaintiff.

With reference to the first point, I must confess I entertain considerable doubt; and, if it had been necessary to decide that question, I should have desired time to consider. But, under

1871

PAPPA
v.
ROSE.

the terms of the reservation, it seems to me that it is not necessary to decide this point, because I am clearly of opinion that the nonsuit was right upon the second point, and that the defendant was in the position of a quasi arbitrator, and so was protected against an action for an error in judgment. The substance of the argument on the part of the plaintiff upon this was, that the defendant's undertaking was an undertaking in his capacity of broker to bring to the performance of his duty a reasonable degree of care and skill, and that, inasmuch as the examination of the raisins was a part of the duty which he had taken upon himself, he was liable to an action for having performed that duty in a negligent and unskilful manner; and that the question whether or not the defendant had exercised due and reasonable skill ought to have been submitted to the jury. I think this was not a matter to be done by the defendant in his ordinary capacity as a broker. It is true that he was a broker, and that he made the contract. But he was only to decide upon the quality of the raisins, in the event of a dispute arising between the parties. It might have been that the buyer was satisfied with the fruit tendered, and in that case the functions of arbitrator would not have come into operation at all. If, on the other hand, the fruit tendered was rejected as not complying with the contract, the opinion of the referee either way would be a binding decision on the matter; and for any mistake which he might make he clearly would not be liable. The case of *Jenkins* v. *Betham* (1) is obviously distinguishable. There, two persons were employed to value, as between an incoming rector and the representatives of the deceased rector, the dilapidations of the rectory house and premises, an umpire to be named by them in case they should disagree. The defendant, the valuer appointed on behalf of the plaintiff, the incoming rector, through ignorance of the true principle for the valuation of ecclesiastical dilapidations, valued so favourably to the other party that his valuation was accepted, and consequently the matter never went to the umpire. As Mr. Justice Williams observed in the course of the argument (2), "the substance of the thing is, that there is no submission until the matter goes to the umpire." In no sense can that case be an authority on the present occasion. Upon the second point, therefore, I am of opinion that my Lord was right in nonsuiting the plaintiff.

---

(1) 15 C. B. 168; 24 L. J. (C.P.) 94.
1 Jur N.S. 237.

(2) 15 C. B. at p. 181.
1 Jur N.S. 239.

BRETT, J. The plaintiff was nonsuited upon two grounds. It was agreed at the trial that he was properly nonsuited, if the ruling of the Chief Justice was right on either ground. It seems to me that the same result must have followed if no such agreement had been come to at all. The first ground of nonsuit was upon the construction of the contract. It was conceded that, if the construction put upon it by my Lord was right, viz., that the subject of the contract was fruit of "fair average quality generally," the plaintiff was properly nonsuited. On the other hand, it was conceded by the defendant, that, if that construction was wrong, and the contract was for fruit of the growth of 1869, the nonsuit ought to be set aside. I must confess that, taking the contract and the evidence as it stood, I entertain considerable doubt. My impression is that there were no sufficient materials before the Court at the trial to enable either my Lord or the jury to say what was the true mercantile meaning of the contract. If it had been shewn that there was in the trade a known and recognized average quality of Black Smyrna raisins, the construction which my Lord put upon the contract at the trial would undoubtedly have been correct; but I incline to think that, if there was no such recognized and acknowledged general average quality, the proper construction of the contract would be that it meant "fair average quality of 1869 growth." There was, however, no evidence one way or the other. But I think it is quite unnecessary for us to determine what is the true construction of the contract, because I think the Lord Chief Justice was clearly right upon the second point. The ruling upon that was, not that the defendant was in the strict sense of the term an arbitrator, but that he was a person filling a position which brought him within an exception well known to the law of England, viz. that a person who is appointed and is acting as an arbitrator to determine a matter in difference between two or more persons does not enter into an implied promise to bring to the performance of the duty intrusted to him a due and reasonable amount of skill and knowledge. The question is merely one of implied undertaking; and the law says there is none such. Was, then, the defendant within that exception? I apprehend that every person falls within it who has taken upon himself to determine a disputed matter between two persons who have agreed to be concluded by his opinion. The parties had so agreed here: and that opinion could not be called for until the fact was in dispute. The defendant, therefore, was a person who was appointed conclusively to determine a disputed fact. One requisite of an arbitration is thus given in Russell on Arbitration, 4th ed. 38:—"The parties must manifestly intend to be concluded by the decision of the person called in, in order to clothe him with the authority of an arbitrator." It is said that the present defendant is not a person in that position, because he was something else besides an arbitrator; he was the broker who negotiated the contract between the parties. I cannot see why his freedom from liability as arbitrator should be taken away from him because he had undertaken another duty, as broker to make the contract. In the latter capacity, I agree that he would be bound to exercise ordinary care and skill; but, when he became the person who was to determine the dispute as to the quality of the raisins, he was clearly brought within the exception. *Jenkins* v. *Betham* (1) was relied on for the plaintiff. That case, however, only goes to shew that the defendant might have been liable for want of due care and skill as broker in making the contract. Williams, J., there points out that the duty of the umpire must be called into action before there was any submission at all. It was of the defendant's conduct as valuer that the plaintiff complained. Just as here, if the defendant had shewn a want of due and reasonable care and skill in making the contract, he might have been liable for that; but not to the present action. The following was cited from Russell on Arbitration, 3rd ed. 42 (4th ed. 38), for the purpose of shewing that this defendant was not an arbitrator,—"It is not in every case where two parties intend to be concluded by the decision of a third party that the third person is an arbitrator." That may or may not be true; and I will not stop to inquire whether the authorities cited bear out the position. It is not necessary to decide it. Upon the whole, I am satisfied that the

(1) 15 C. B. 168; 24 L. J. (C.P.) 94. 1 Jur. N S 40

1871

PAPPA
v.
ROSE.

ruling of the Chief Justice upon the second point was right, and that this rule must be discharged.

BOVILL, C.J. Neither party required any question to be left to the jury. It was treated by both as a question of construction upon the terms of the contract itself. I consulted my Brother Willes upon both points; and, acting upon his advice, I stopped the case.

As to the first point, it is to be observed that the subject of the contract is "Black Smyrna raisins:" then follow stipulations as to what the raisins were to be, their mode of packing, &c., each being separated by a dash, the effect of which is to make each stipulation a separate sentence,—or as if each had been written in a separate line. In the first place, they are to be "1869 growth:" next, they are to be "fair average quality in opinion of selling broker." What is the meaning of that? The plaintiff contends that they were to be of fair average quality and also of the growth of 1869. Those are not the words of the contract. Are they the meaning? Do the two expressions mean the same thing? The whole case proceeded upon the assumption that the two are different. The plaintiff's case was, that the whole of the shipments of 1869 were of inferior quality to those of former years; and that, in truth, "fair average quality generally" was different from "fair average of 1869 growth." Several witnesses stated that the raisins tendered in fulfilment of the contract were not of fair average quality generally. That being so, and the words used being "fair average quality," it seemed to me that they ought not to be read as if the words "of 1869 growth" had been inserted after the words "fair average quality." There would, it was urged, be a difficulty in ascertaining the fair average quality of the growth of 1869 at the date of the contract; and that the buyer ought to be able to ascertain the quality of the fruit at the time of the contract, or at all events at the time of the delivery or tender. But, if the parties had intended to stipulate that the quality should be of the average of the particular year's growth, they might easily have done so, as is usual in corn contracts. I retain the opinion I expressed at the trial. I think the words "fair average quality" apply to "Black Smyrna raisins," the

1871

PAPPA
v.
ROSE.

subject of the contract, and not to "1869 growth," which is in a separate sentence.

Upon the other question, viz. whether an action can be maintained against the broker, who is admitted to have acted bonâ fide, I see no reason to dissent from the conclusion arrived at by my learned Brothers. The selling broker was the person selected by both buyer and seller to determine whether or not the raisins tendered were of fair average quality. It by no means follows that, when two persons submit a matter in difference to the arbitrament of a third, they agree to take a person of the greatest amount of skill or intelligence. No matter what may be the degree of skill he possesses, the decision of the person selected is final and conclusive; and he is not liable to an action if he makes a mistake. Here, it is want of skill only that is suggested. The defendant was in the nature of an arbitrator chosen by the parties, whose decision is final. Upon general principles, no action lies against him. There is no implied contract on his part, except that he will act honestly and bonâ fide.

Rule discharged.

Attorneys for plaintiff: *Thomas & Hollams.*
Attorneys for defendant: *Stibbard & Beck.*

THE PHOSPHATE OF LIME COMPANY, LIMITED *v.* GREEN AND ANOTHER.

1871
Nov. 11.

9 Ch 10
9 Ex 233, 245,
253, 262, 281
293–4
20 Eq 61
7 HL 659
675
2 App Cas
370
14 CLD 319
24 CLD 155

Public Company—Power and Authority of Directors—Ratification by Shareholders of an Act ultrà Vires of the Directors.

A company was established for the working of two mines, with a nominal capital of 300,000*l.*, divided into 12,000 shares of 25*l.* each. Difficulties arising as to the title to one of the mines, and the defendants, who had negotiated the purchases for the company, and were to receive 10,000*l.* from the vendor of each mine, and had received the 10,000*l.* upon the completion of the purchase of the other mine, having bought 400 shares in the market and not being prepared to take them up, applied to the company for assistance, and the latter advanced them 6500*l.* upon the defendants undertaking to return it in the event of the purchase of the second mine not being completed within three months. The shares were taken up, but the contract for the purchase of the mine ultimately went off. The directors then called upon the defendants to return the 6500*l.*, and, after much negotiation, it was arranged that the defendants should transfer to the company the 400 shares (10*l.* paid up), in satisfaction and discharge of the claim of the company against them. This transaction took place in August, 1866; and in March, 1867, at a meeting of the shareholders it was agreed that the company should go into liquidation, and its business be transferred to a new company with a diminished capital and 10*l.* shares, the directors of the new company being the directors of the old one, and the shareholders in the old company being holders of share for share in the new one. A report of the directors was read, shewing the reasons for the liquidation and transfer, and that the diminution of the capital was owing partly to the abandonment of the purchase of the second mine and partly to "shares forfeited for non-payment of calls." At this meeting an account was handed to each shareholder present, in which the sum of 4000*l.* was set down as the price of "shares cancelled;" and the account of the defendants in the company's ledger was credited with 4000*l.*, "as per shares forfeited account."

By the articles of association of the company the directors were prohibited from purchasing their own shares; but they had power to compromise debts due to them, and to forfeit shares for non-payment of calls:—

Held, that, assuming that the compromise with the defendants by the acceptance and cancellation of the 400 shares was ultrà vires of the directors, the subsequent conduct of the shareholders in assenting to the transfer of the old to the new company, with knowledge or the opportunity and means of knowing, if they thought proper to inquire, that such transfer was in part founded upon such cancellation, was a ratification and acquiescence in what the directors had done, and sustained a plea of accord and satisfaction to an action brought in 1870 against the defendants in the name of the old company for the recovery of the 6500*l.* advance.

To shew assent and acquiescence in such a case, it is not necessary (or possible) to prove the acquiescence of each individual shareholder. It is enough to shew circumstances which are reasonably calculated to satisfy the Court or a jury that the thing to be ratified came to the knowledge of all who chose to inquire, all having full opportunity and means of inquiry.

By one of the articles of association of a joint-stock company, it was provided that "the company shall not, under any circumstances, purchase its own shares." The directors, having advanced money to the promoters of the company, to enable them to take up shares which they (the promoters) had bought, but for which they were unable to pay, agreed, by resolution, to abandon their claim to have the money returned, in consideration of 400 shares (upon which 10*l.* per share had been paid up) being given up to them to be cancelled:—

Semble, that this was a "purchase of shares" within the prohibition above mentioned.

The first count of the declaration was for money lent by the plaintiffs to the defendants; the second for a wrongful conversion by the defendants of goods of the plaintiffs, to wit, twenty-five debenture bonds of the Phosphate of Lime Company.

Pleas, to the first count, never indebted, payment, and that the defendants satisfied and discharged the plaintiffs' claim by delivering to the plaintiffs certain shares in the company, then being of great value, to wit, 6000*l.*, and all their right and title therein, and the certificates thereof, and a certain paper purporting to be a transfer of the said shares, and by the plaintiffs accepting the same in full satisfaction and discharge of the plaintiffs' claim; and to the second count, not guilty, and that the defendants satisfied and discharged the plaintiffs' claim by delivering to the plaintiffs certain shares, and the certificates thereof, and a paper purporting to be a transfer of the shares, and by the acceptance by the plaintiffs of the same in full satisfaction and discharge of the causes of action in the last count stated. Issue thereon.

The cause was tried before Brett, J., at the sittings at Guildhall after last Trinity Term. The facts proved were as follows:—The Phosphate of Lime Company, Limited, was established in July, 1865, under the Joint Stock Companies Act, 1862 (25 & 26 Vict. c. 89), for the purpose of purchasing or leasing and working certain mines or quarries of phosphate of lime in the island of Sombrero, in the West Indies, and elsewhere. Its capital was to be 300,000*l.*, divided into 12,000 shares of 25*l.* each. The articles of association of the company contained, amongst others, the following provisions:—

Art. 19. "The company may forthwith issue the 12,000 shares of 25*l.* each, into which its nominal capital of 300,000*l.* is divided, and may from time to time, with the sanction of a special resolution, increase the capital beyond the sum of 300,000*l.*, by the creation of new shares; provided that such new shares shall in the first instance, unless the company on the creation thereof shall otherwise determine, be offered to all the members of the company for the time being, in proportion to the number of their respective shares, and such of them as are not taken by the members may be disposed of to such other persons as the board shall determine. The company shall not, under any circumstances, purchase its own shares."

Art. 84, sub.-s. 4. "They (the directors) may, at their discretion, make, enter into, rescind, alter, vary, renew, or otherwise deal with any contracts or engagements by or on behalf of the company, or the terms and conditions thereof, or the time or manner at or in which any payments or securities or obligations in respect of any such contract or engagement may be payable, and make such payments, securities, or obligations payable at other times or in another manner than may have been originally agreed upon, or grant or enter into a new or other contract or engagement in lieu thereof or in exchange therefor."

Sub.-s. 11. "They may let, mortgage, sell, or otherwise dispose of, either absolutely or conditionally, in such manner and upon such terms in all respects as they may think fit, any of the property of the company, and may accept payment or satisfaction for any property so disposed of or dealt with, in such manner as they may deem expedient."

Sub.-s. 18. "Generally where these articles are silent or do not otherwise provide, the directors, in their discretion, shall have full power to do and execute all such acts, deeds, and things necessary or deemed by them proper or expedient for carrying on the business of the company, and to enforce, perform, and execute all acts and things in relation to the company, and also to make rules and regulations for carrying on the business and concerns of the company, and to alter and vary the same as they shall think fit; and all such rules and regulations shall be binding on the company, provided the same be not repugnant to law or to any of the provisions of these articles."

Art. 113. "The directors may decline to register any transfer of shares made by a member who is indebted to the company, and shall have a paramount lien upon all the shares of any member for the amount of any debt due from him to the company either solely or jointly with any other person; and, if such debt be not paid within three months from the service of a notice on such member requiring him to pay such debt together with interest and any expense that may have accrued by reason of such non-payment, the shares of such member, or so many of such shares as shall be sufficient to pay such debt, shall be liable to be forfeited, and, by a resolution of the directors to that effect, may be forfeited accordingly; and the company may thereupon sell and transfer all or any of the shares so forfeited, and apply the proceeds of such sale in or towards payment of the debt so due from such member as aforesaid; and the consent of such member shall not be necessary for giving validity to any sale, disposition, or transfer of any such shares."

Articles 121 to 127 contained provisions for forfeiture of shares for non-payment of calls, &c.

The defendants, Green and Nicholls, were the promoters of the company, and on their behalf negotiated with one Wood for the purchase of a mine in the island of Sombrero, and also with one

1871

PHOSPHATE OF LIME CO. v. GREEN.

Dumas for the purchase of a mine at Lagrosan, in Spain. Upon each of these transactions, Green and Nicholls were to receive from the vendor a sum of 10,000*l.*, 7500*l.* in cash, and 2500*l.* in debenture bonds. The Sombrero purchase was duly completed, and Green and Nicholls received the 10,000*l.* thereon, as agreed. Some difficulty, however, arose as to the vendor's title to the Lagrosan mine; and, although the directors had on the 27th of February, 1866, issued a prospectus, in which they stated that they had "succeeded in obtaining" both mines, the purchase of the last-mentioned mine had not been completed at the time the transaction next mentioned took place.

Green and Nicholls, for the obvious purpose of furthering the interests of the company, had bought a large number of shares in the market; and, being unprepared to take them up on the settling day, they applied to the directors for assistance, and the directors, knowing the injurious consequences which would result to the company from these shares being again thrown upon the market, with the consent and at the request of Dumas agreed to advance to Green and Nicholls 6500*l.* in cash and fourteen debenture bonds for 100*l.* each; and a resolution to that effect was passed at a meeting of the 9th of March, 1866. Upon receiving the advance, Green and Nicholls signed the following receipt:—

"London, March 9, 1866.

"Received on our joint and several account from the Phosphate of Lime Company (Limited) the sum of 7500*l.*, and twenty-five debenture bonds of 100*l.* each of the company; the said cash and bonds being taken and accepted by us as an advance from the company pending the completion of M. Dumas's purchase, and to be accounted for by us jointly and severally and repaid to the company to the extent of 6500*l.* and fourteen of the said bonds of 100*l.* each, in the event of the said purchase from any cause not being completed within three months from the date hereof.

"Thomas Green.
"Edward C. Nicholls."

Green and Nicholls in fact received only 6500*l.* in money and fourteen bonds; 1000*l.* and eleven bonds being retained by the company by arrangement. The shares (400 in number) were accordingly taken up by Green and Nicholls.

The purchase of the Lagrosan mine eventually going off, the directors called upon Green and Nicholls to repay them the above advance; and, after some negotiation, by a resolution of the directors of the 10th of July, 1866, confirmed by a subsequent resolution of the 24th, it was arranged "that 400 shares (10*l.* paid-up) of the company should be delivered up by Green and Nicholls to be cancelled, in satisfaction of the debt due by those gentlemen to the company," with a promise on the part of the directors, that, if any dividends should be declared as to 300 of the shares within three months, Green and Nicholls should have the benefit thereof. The 400 shares were accordingly delivered up by Green and Nicholls to the directors, and cancelled by them; and the account of Green and Nicholls in the company's ledger was credited, under date the 21st of August, 1866, "By shares forfeited account, 4000*l.*" The names of Green and Nicholls appeared in the list of "forfeited shares" for a like sum.

In consequence of the failure to obtain the Lagrosan mine, it was proposed at the end of the year 1866 that the Phosphate of Lime Company should go into liquidation, and should transfer to a new company, to be called the Sombrero Company, all its business and assets, that the capital should be reduced to 132,000*l.*, and the shares instead of 25*l.* each should be reduced to 10*l.* each, the shareholders in the Phosphate of Lime Company to be shareholders, share for share, in the new company. Accordingly, on the 6th of March, 1867, a meeting of the shareholders of the Phosphate of Lime Company was held, at which a report of the directors was read, stating the reasons for the liquidation of the original company and the prospects of the new company, and informing the shareholders that the proposed reduction of the capital had been effected partly by shares cancelled owing to the abandonment of the Lagrosan purchase, partly by "shares forfeited for non-payment of calls," and partly by the abatement by the vendor of the Sombrero mine in the number of paid-up shares issued to him. At this meeting the report was read, the books of the company were produced, and an account was circulated amongst the shareholders in which the sum of 4000*l.* appeared as representing forfeited shares.

The transfer having taken place, the Sombrero Company (the directors of which were the directors of the Phosphate of Lime Company) continued to carry on business, paying several dividends, down to the end of 1869, when it also went into liquidation.

On the 7th of February, 1870, the liquidator of the Phosphate of Lime Company made a demand upon Green and Nicholls for the 6500*l.* and the fourteen bonds referred to in the receipt of March 9th, 1866; and, upon their refusal to comply with such demand, the present action was brought by leave of the Court of Chancery.

For the plaintiffs, it was submitted that the directors had no authority under the articles of association to make the alleged compromise of July, 1866. For the defendants, it was insisted that the directors had authority to make the compromise; and that, assuming they had not, the circumstances attending the transfer of the business of the original company to the Sombrero Company shewed such ratification or acquiescence on the part of the shareholders as to make the act lawful, and consequently that the plea of accord and satisfaction was proved. The plaintiffs' counsel declined to go to the jury; and a verdict was thereupon taken, by the direction of the learned judge, for the defendants upon that plea.

Hawkins, Q.C., in Easter Term last, obtained a rule nisi to enter a verdict for the plaintiffs for 6500*l.*

Nov. 8, 10. *H. Giffard, Q.C.*, *W. G. Harrison*, and *Benjamin*, shewed cause. The receipt by the directors of the 400 paid-up shares in settlement of their claim against Green and Nicholls was a good accord and satisfaction, and clearly within the authority conferred upon them by the articles of association. And, if there was any excess, the subsequent ratification and adoption by the company of the compromise, and the cancellation of the shares, made the act lawful. The situation of the defendants was thereby altered to their prejudice; and that of the company improved to the extent of the increased dividends which would result to them from the cancellation. The transaction was not a "purchase of shares," within article 19, but a compromise or settlement of a claim within article 84, sub-sections 4 and 18, and article 113, which obviously contemplate a case where the company may take back their own shares in satisfaction of a debt due to them. A resumption of capital under such circumstances cannot be called a purchase. The prohibition only applies to the buying of shares

1871

PHOSPHATE OF LIME CO. v. GREEN.

in the market, or, in other words, to what is called "rigging the market." At all events, there was abundant evidence of ratification, with full knowledge of all the circumstances. The shareholders had reasonable notice by the report and accounts presented to them at the meeting in March, 1867, when the whole property and effects and rights and obligations of the old company were by consent of the proprietors transferred to the new one. The shares in the new company would necessarily be increased in value by the cancellation of the defendants' shares; and its members have gone on receiving dividends on the footing of such cancellation being authorized down to the time of the commencement of the present action. When all the facts are looked at, it is impossible to say that the company had not ample opportunity of knowing what had been done. There are numerous authorities to shew that where an act has been done by a public company which is ultrà vires, or to the legality of which certain formalities are requisite, and the circumstances are such that knowledge and acquiescence may be imputed to every shareholder, the Court will, as against the company, infer that the necessary formalities have been complied with: *Bargate* v. *Shortridge* (1); *Re Magdalena Steam-Navigation Co.* (2); *Re British Provident Life and Fire Assurance Society* (*Grady's Case*) (3); *Reuter* v. *Electric Telegraph Co.* (4); *Evans* v. *Smallcombe* (5); and the jugdment of Blackburn, J., in *Taylor* v. *Chichester and Midhurst Ry. Co.* (6); and see Chitty on Contracts, 7th ed. 255. The decision of the House of Lords in *Spackman* v. *Evans* (7) in no way conflicts with the present argument. The act of the directors here was not an absolute nullity, but, at the most, was what the civilians call a relative nullity; and the company can only take advantage of it by rescinding it, and returning what they had received under it: see the judgment of Mellish, L.J., in *Ayers* v. *South Australian Banking Co.* (8)

Nov. 11. *Hawkins, Q.C.*, *Sir G. Honyman, Q.C.*, and *Lanyon*, in support of the rule. The 6500*l.* was a debt justly due to the company. The directors were under no obligation to advance the money to Green and Nicholls: their remuneration was to come from the vendor of the mine. Although it might have been competent to the directors to compromise their claim in some shape, they clearly could not do so by a purchase of shares, for that is distinctly prohibited by the 19th clause of the articles of association; and they could not legally do it by a cancellation of shares, for that would be diminishing the capital of the company, which is distinctly prohibited by s. 12 of the Companies Act, 1862 (25 & 26 Vict. c. 89), which was in force at the time. No doubt, shares may be *forfeited* for non-payment of calls, but that is not this case; it is the case of an acquiring by the company of its own shares by agreement for a money payment, or, what is the same thing, the forbearance of a debt, and therefore within art. 19, which provides that "the company shall not, *under any circumstances,* purchase its own shares." Then, as to the supposed ratification. What are the facts relied on by which the shareholders are to be fixed with notice or knowledge of the act of the directors in compromising their claim by the cancellation of these shares? They are simply the report of the directors at the meeting for the transfer of the Phosphate of Lime Company to the Sombrero Company, in which it appeared that the reduction of the capital of the new company was in part due to "shares forfeited for non-payment of calls," together with the statement in the accounts then presented to the shareholders that Green and Nicholls had been credited with the 4000*l.* for the cancelled shares. That clearly was no notice to the shareholders of *this* transaction.

---

(1) 5 H. L. C. 297; 24 L. J. (Ch.) 457.
(2) Johns. 690; 29 L. J. (Ch.) 667.
(3) 1 D. J. & S. 488; 32 L. J. (Ch.) 326.
(4) 6 E. & B. 341; 26 L. J. (Q.B.) 46.
(5) Law Rep. 3 H. L. 249.
(6) Law Rep. 2 Ex. 356, 375.
(7) Law Rep. 3 H. L. 171.
(8) Law Rep. 3 P. C. 548.

3 Jur. N.S. 1245
(2) S.C. 6 Jur. N.S. 975.
3) S.C. 9 Jur. N.S. 631.

[Willes, J. It was calculated to put them upon inquiry, and that would have led to knowledge.]

It was not calculated to lead the shareholders to the knowledge that these shares had been bought by the directors, but rather to induce them to believe that they had been forfeited in invitum. Besides, the report and account were not sent to the shareholders; nor was there evidence that a single shareholder saw the entry in the ledger.

[Brett, J. The report was read at the meeting in March, 1867, and a copy of the account was given to all the shareholders present; and a sufficient number of shareholders attended to authorize the transfer of the business of the Phosphate of Lime Company to the Sombrero Company. The report shewed that the shares in question were cancelled, and the account shewed what that cancellation meant.]

The facts to shew acquiescence here were not nearly so strong as those in the recent cases in the House of Lords, of *Spackman* v. *Evans* (1), *Evans* v. *Smallcombe* (2), and *Houldsworth* v. *Evans* (3). In the first of those cases, a company, called the Agriculturists' Cattle Assurance Company, was formed. A deed of settlement was executed, which contained various clauses as to the admission and withdrawal of shareholders, and the transfer and forfeiture of shares. On difficulties arising in its business, a proposition was made to allow, on certain conditions, dissenting shareholders to retire on the forfeiture of their shares. This proposal, of which distinct notice had been given to all, was adopted at a public meeting of the shareholders. Spackman, a shareholder who had executed the deed, dissented from these conditions, and sought to wind up the company. In this he failed; and he was sued for calls. Pending the litigation, the directors allowed him to retire upon conditions which were not those named in the deed or in the proposal agreed to at the meeting. No notice of the conditions thus entered into with Spackman was shewn to have been communicated to the other shareholders; but the fact of Spackman's retirement was known to them, and there was no imputation of any fraudulent concealment. The name of Spackman (who had performed all the conditions on which leave to retire was granted to him) was removed from the list of shareholders in 1849. Changes were afterwards made in the mode of carrying on the company's business, and dividends were paid; but Spackman was not informed of the changes; he never received a dividend, and he never was called on to take, and never did take, any part in the affairs of the company. In 1861 an order was made for winding up the company; and it was held by the House of Lords (Lord St. Leonards and Lord Romilly dissenting), that Spackman's name was rightly placed on the list of contributories. There it was brought to the knowledge of every shareholder that some compromise had been made; but, as it was not notified to them what that compromise was, the transaction was held to be void. Lord Chelmsford says (1): "The arrangement, being ultrà vires of the directors, could only be subsequently made good by the acquiescence of all the shareholders, with knowledge of the transaction. But mere time alone, without such knowledge, could never, in my opinion, grow into proof of acquiescence, or render valid that which, without the consent of all the shareholders, was absolutely void ab initio." In the next case, *Evans* v. *Smallcombe* (2), it was held that an arrangement allowing the members of a company to retire from the company under certain conditions therein agreed to by a public meeting of the shareholders convened by a due notice, is not in itself valid, unless made in accordance with the provisions of the deed of settlement, and, if not assented to directly or indirectly, after due notice, by all the shareholders, may be impeached by any one of them; but that, if the means of notice to all appear sufficient, so as to raise a clear presumption of knowledge and acquiescence, and the arrangement is left unimpeached by any one for a great many years, the shareholder who has been allowed to retire, and whose name has been removed from the list of shareholders, will be held to be relieved from his liability as a shareholder. But Lord Cairns, in his judgment, says (3): "Lapse of time clearly would not make valid that which at the beginning was invalid." In the third case, *Houldsworth* v. *Evans* (4), it was held by Lord Cranworth (who differed from the majority) that, where shareholders know that their directors have been exceeding their legal powers, and take no steps in the matter, but allow the things done to remain unimpeached for years, they must be taken to have, retrospectively, sanctioned what has been done. But Lord Cairns (5) said that it was impossible to ascribe to the mere mention of "cancelled shares" in the balance sheets the effect sought to be imputed to similar words in this case. In *Imperial Bank of China, &c.* v. *Bank of Hindustan, &c.* (6), it was held that acquiescence, to bind all the members of a company to a bargain which there is no power to confirm, must be acquiescence by every member of the company. Giffard, V.C., there says (1): "It is excessively difficult to make out acquiescence on the part of a body such as a company is. I can understand acquiescence in a case where it is in the power of the persons said to have acquiesced to confirm it; but, when it is not in the power of the persons said to have acquiesced to confirm it, it requires, in order to establish acquiescence, a case from which it must necessarily be inferred that every member of the company has assented." These cases clearly shew that the evidence of ratification or acquiescence in the present case was insufficient to bind the general body of shareholders.

---

(1) Law Rep. 3 H. L. 171.

(2) Law Rep. 3 H. L. 249.

(3) Law Rep. 3 H. L. 263.

---

(1) Law Rep. 3 H. L., at p. 233.

(2) Law Rep. 3 H. L. 249.

(3) Law Rep. 3 H. L., at p. 253.

(4) Law Rep. 3 H. L. 276.

(5) Law Rep. 3 H. L., at p. 275.

(6) Law Rep. 6 Eq. 91.

[WILLES, J. It is to be observed that those were all cases of liquidation,—a proceeding intended for the shareholders themselves.]

WILLES, J. The argument of this case has occupied a considerable time, though not longer than its importance warranted. But, when it comes to be threshed out, the facts which are material to the forming a judgment upon it appear to be shortly these:—The plaintiffs' company was formed for the purpose of working two mines, one in the island of Sombrero, in the West Indies, and the other at Lagrosan, in Spain, with a capital of 300,000*l.*, in 12,000 shares of 25*l.* each, of which 10*l.* per share was paid up. Negotiations were entered into by the company for the purchase of the mines. The Sombrero mine was duly conveyed to them; but a difficulty arose as to the title of the Lagrosan mine, and up to the month of March, 1866, the sale had not been completed; and the purchase ultimately went off. The defendants, Green and Nicholls, were the promoters of the company, and would receive a considerable benefit in the shape of bonus or commission if the company was successfully floated. They had in fact received from the vendor 10,000*l.* (in money and shares) on the conveyance of the Sombrero mine; and they were to receive a similar sum upon the completion of the purchase of the Lagrosan mine. They appear to have purchased a considerable number of shares in the company; and when the time arrived for taking them up, owing to the purchase of the Lagrosan mine being still in fieri, they were un-

---

(1) Law Rep. 6 Eq., at p. 100.

1871

PHOSPHATE OF LIME CO. *v.* GREEN.

able to obtain funds. Under these circumstances, it being considered that their failure to take up the shares which they had so agreed to purchase would have an ill effect upon the prospects of the company, the directors, as representing the company, agreed to advance to Green and Nicholls the sum sought to be recovered in this action; and in respect of that advance the following receipt was given:—"London, March 9, 1866. Received on our joint and several account from the Phosphate of Lime Company (Limited) the sum of 7500*l.* and twenty-five debenture bonds of 100*l.* each of the company, the said cash and bonds being taken and accepted by us as an advance from the company pending the completion of M. Dumas's purchase, and to be accounted for by us jointly and severally, and repaid to the company, to the extent of 6500*l.* and fourteen of the said debenture bonds of 100*l.* each, in the event of the said purchase from any cause not being completed within three months from the date hereof." Green and Nicholls, therefore, accepted the money and the bonds as an advance to be accounted for by them to the company, to the extent mentioned in that receipt, in the event of the purchase of the Lagrosan mine not being completed within three months; and we must take it that Green and Nicholls were to have the benefit of that advance in the event of the purchase of the mine being completed. Upon the purchase falling through, a claim was made upon the defendants for the money and bonds so advanced to them, which claim they resisted. An arbitration was proposed, and negotiations took place between the directors and Green and Nicholls which resulted in a compromise on or about the 24th of July, 1866. That compromise in effect was, that, instead of paying back the money advanced to them and returning the debenture bonds, Green and Nicholls should give up to the company 400 shares on which 10*l.* per share had been paid up, to be cancelled; and it was agreed that this should be considered as a settlement of the claim of the company against them. As these shares were not money, but were of value, the giving them up and the acceptance of them by the directors would, if authorized, be a satisfaction of their claim against the defendants. The directors, as representing the company, did accept that satisfaction by a formal resolution, and the shares were given up and were cancelled. It was suggested at the trial that, not only was that transaction unauthorized, but it was fraudulent. That charge, however, failed; and in fact all imputation was withdrawn. It must be taken, therefore, that this was a substantial transaction, and one which, if the directors had authority to enter into it, was an honest and fair transaction, and discharged the defendants as against the company.

The reply of the plaintiffs to that is, that the directors had no authority to accept the compromise at all. I do not go along with the argument of Mr. Benjamin, that, assuming that the directors had no authority to make the compromise, yet, inasmuch as the company received some benefit from the transaction, the company are not in a condition to say that the transaction was absolutely void but only that it was what he calls relatively void, so that, if the company wished to avoid it, they could only do so by rescinding it and returning what they had received under it. That may be very good sense, if the matter be looked at in a moral point of view; but it is not law. If the act done be unauthorized, the law makes it absolutely void at the election of the person on whose behalf it is done, so that he may repudiate it or take the benefit of it as he chooses; but it is not a relative nullity, in the sense that the person not choosing to ratify it is to perform some condition precedent or do some act before he declares it to be void. It comes round, therefore, to this alternative: either the defendants must establish that the directors had authority at the time, or that the company did by their subsequent conduct assent to and ratify the act of the directors so as to bind themselves as if there had been a previous authority.

As to whether the transaction was authorized or not, it is unnecessary to say much. As to this, the 19th and the 113th clauses of the articles of association are to be considered. The 19th clause provides that "the company shall not, under any circumstances, purchase its own shares;" and the 113th provides that "the directors may decline to register any transfer of shares made by a member who is indebted to the company, and shall have a paramount lien upon all the shares of any member for the amount of any debt due from him to the company, either solely or jointly with any other person; and, if such debt be not paid within three months from the service of a notice on such member requiring him to pay such debt, together with interest and any expenses that may have accrued by reason of such non-payment, the shares of such member, or so many of such shares as shall be sufficient to pay such debt, shall be liable to be forfeited, and, by a resolution of the directors to that effect, may be forfeited accordingly; and the company may thereupon sell and transfer all or any of the shares so forfeited, and apply the proceeds of such sale in or towards payment of the debt so due from such member as aforesaid; and the consent of such member shall not be necessary for giving validity to any sale, disposition, or transfer of any such shares." The 113th clause, therefore, gives the directors a discretion to forfeit shares held by a debtor to the company, by way of lien for the debt due: and, no doubt, if the shares in question had belonged to the defendants, and were of the value of the debt owing by them, the directors might under clause 113 have discharged the defendants by a forfeiture of the shares. But it must be by an act of the directors themselves, apart from any contract with the defendants. These shares were not in the names of the defendants, but in the names of third parties, and therefore the transaction does not fall within the 113th clause. It may be observed that the power to forfeit shares was not altogether foreign to the duty of the directors: they might under certain circumstances do so; but the taking the shares at a valuation, and forfeiting them at that price, would seem to amount to a sale. I assume, therefore, for the present, that the transaction, being between the directors and persons having control over the shares, would fall within the 19th clause. The debt may be treated as something given for the shares. This is not to be taken as an expression of decided opinion, though my mind inclines that way. It is enough to say that the transaction has the character of a sale. I assume it was so. Upon the first alternative, therefore, the defendants fail.

It remains to consider whether or not the defendants have established the second branch of the alternative, viz. that the company did ratify and adopt the act of the directors. Now, the law with respect to ratification is clear, and applies equally to cases of contract and of tort. The principle by which a person on whose behalf an act is done without his authority may ratify and adopt

9 Ch 289
260
7 HL 693

9 Ch 239,
7 HL 693

it, is as old as any proposition known to the law. But it is subject to one condition: in order to make it binding, it must be either with full knowledge of the character of the act to be adopted, or with intention to adopt it at all events and under whatever circumstances. Is it proved that the company did intend to adopt the resolution of July, 1866? I may observe that the company at the end of 1866, or early in 1867 (I should say on the 6th of March, 1867), transferred its business to a new company called The Sombrero Company, upon a full consideration, and upon an arrangement by which the shares and capital of the Phosphate of Lime Company were to be absorbed into the new company, the shareholders in the former company becoming the holders of an equal number of shares in the Sombrero Company of 10*l.* each instead of 25*l.* That transfer which was so completed in March, 1867, was taken to be beneficial to the shareholders in the Phosphate of Lime Company; and there is no suggestion that any of them did object. The result was that the capital of the Phosphate of Lime Company was treated as the capital of the Sombrero Company, and the shareholders of the new company had all the benefit of the cancellation of the 400 shares referred to in the resolutions of the 10th and 24th of July, 1866. After that arrangement so made and assented to, accounts were made out and brought before the shareholders of the Phosphate of Lime Company at the meeting in March, 1867, accompanied by a report of the directors shewing the reasons for the liquidation of the old company and the future prospects of the new company, and stating the capital of the new company to be 132,000*l.*, and shewing how that reduction had been effected, viz. partly by shares cancelled owing to the abandonment of the Lagrosan purchase, and partly by "shares forfeited for non-payment of calls," and partly by the reduction by the vendors of the Sombrero estate on the fully paid-up shares issued to them. It is clear, then, that the capital of the new company was reduced by, amongst other things, the 400 shares given up by the defendants on the compromise in July, 1866; and it is clear that they were intended to be included in the account submitted to the shareholders. It is said that the words "shares forfeited for non-payment of calls" do not properly describe the transaction. But, if it be intended to allege that there was improper concealment, that should have

1871

PHOSPHATE OF LIME CO. v. GREEN.

9 Ex 240

been relied on in the charge of fraud. It was involved in the abandonment of the Lagrosan purchase: it was connected with that purchase, and with the dealings with the persons who were instrumental in its negotiation. I have no doubt whatever in my mind that those words did convey to every person interested in the Phosphate of Lime Company who thought proper to make inquiry sufficient information on the subject; and, with respect to those who did not think proper to seek information, the fact that they did not choose to inquire is strong evidence that they were satisfied to adopt the acts of the directors at all events and under whatever circumstances, and to take the benefit of the arrangement made by them in any form they thought proper. Looking to the fact that the transaction was not concealed, and that no shareholder was called at the trial to say that he did not know of it, I cannot doubt that the report and account did convey sufficient information to the shareholders as to the cancellation of the 400 shares, and that there was no one shareholder who was ignorant of it. Further, it appeared that the defendants were credited in the books of the company, under date the 21st of August, 1866, "By shares forfeited account, 4000*l.*" I believe that these are all the material facts. I think there was abundant evidence of a ratification, in the sense of an adoption of the act of the directors, either with knowledge of all the circumstances, or with an absolute intention to adopt it. All imputation of fraud was withdrawn. The transaction appears to have been a notorious one at the time. The Phosphate of Lime Company was in difficulties. A proposal was made for a transfer to the new Sombrero Company under circumstances under which every shareholder would naturally have his attention called to all the accounts and transactions of the company. Accounts were presented shewing a forfeiture of shares with an amount set down as 4000*l.*, a sum which was calculated to excite attention and inquiry. No shareholder is called to say that he was not aware of the transaction. All this shews clearly to my mind that there was a ratification. The transfer to the Sombrero Company involved a ratification, because it was founded upon a reduction of the capital by means, amongst others, of the cancellation of these 400 shares. It would be a waste of time to refer to authorities to shew that one who chooses to adopt the

7 Ex 240

benefit of a transaction ought to be bound by it. The present case, however, goes much further than that, because, from the 6th of March, 1867, down to the 16th of May, 1870, when this action was brought, the shareholders have continued to receive dividends and to carry on the business of the Sombrero Company upon the footing of the dealings of March, 1867. That circumstance appears to me to add considerable weight to those I have already adverted to, and makes the case stronger against the company. I think it would be highly inequitable and unjust that the company should, after so long an acquiescence, be allowed to rip up the transaction and call upon the defendants to pay back the money, without at least restoring them the shares the cancellation of which formed the basis of the arrangement which was made by the resolution of the 10th of July, 1866, and confirmed by the resolution of the 24th.

It is unnecessary to go into the authorities which were cited in the course of the argument, because I do not think any one of them affects the principle upon which our decision is founded, and from which I feel the great danger of departing. The case which was mainly relied on for the plaintiffs was that of *Spackman* v. *Evans.* (1) That was a case of very great hardship: a forfeiture of shares was unripped after the lapse of ten years, because contrary to the deed of association. Lord St. Leonards and Lord Romilly differed from the majority of the peers, not so much upon the application of the general principle of law as to acquiescence or ratification, as upon the conclusion to be drawn from the facts then before them. Balance-sheets had been put in from time to time, in the ordinary course of business, to which the attention of the shareholders might have been called, and which contained entries calculated to invite them to examine the books of the company, but not containing information as to extraordinary transactions such as those which occur in this case, of a nature to induce particular inquiry and criticism. The majority of the peers were of opinion that they ought not from the facts to draw the inference of notice, or to hold that the shareholders were to be "deemed to have had notice." Lord St. Leonards thought it was enough to shew that they had the means of knowledge, and that, if the means of knowledge existed, notice ought to be imputed. I do not understand their lordships as laying down in that case any principle which should be binding as matter of law, but merely what was the inference which they, as judges of the law and the facts, ought to draw from the evidence before them. No one of the cases referred to seems to me to be at all like the present. I think the cardinal fact of the transfer of the old business of the Phosphate of Lime Company to the Sombrero Company, under the circumstances before stated, makes an end of the matter; and that the transaction as to these shares could not and did not escape inquiry. Upon the best consideration, therefore, which I can bring to this case, I come unhesitatingly to the conclusion that there was evidence from which the jury might properly hold that the condition of ratification was fulfilled, and that the verdict ought to be supported.

---

(1) Law Rep. 3 H. L. 171.

KEATING, J. I am of the same opinion. This was an action for money lent; and the only plea we have to consider is one of accord and satisfaction. To prove that plea, the defendants shewed an accord and satisfaction with the directors of the company by the delivery up to them of 400 shares to be cancelled, and the acceptance thereof by the directors. To meet that, it is alleged on the part of the company that what the directors did was ultrà vires and in excess of their authority. The answer of the defendants is twofold; first, that the directors did not exceed the authority vested in them by the articles of association; and secondly, that, if they did, the company,—that is, the shareholders,—with full knowledge of what the directors had done, ratified and confirmed their act.

As to the first question, I agree with the impression of my Brother Willes, that the transaction with respect to the cancellation of the shares would amount to a sale, and so fall within the prohibition of article 19. But I also agree with him that it is unnecessary to determine that, because I am clearly of opinion that there was evidence from which the jury might properly find that the company ratified the act of the directors, with full knowledge of all the facts; and that is the sole ground upon which my judgment is founded. If the question before us had been that which was before the

House of Lords in the cases referred to, I must confess I should have felt some difficulty in coming to the conclusion that it was proved to my satisfaction that the shareholders, with full knowledge of the transaction, ratified that which the directors had done, with the intention of ratifying and confirming it. But that is not now the question; it is simply whether or not there was evidence upon which the jury might find acquiescence. It must be assumed that the jury have found the fact; and the only question is whether there was evidence to warrant their finding. That relieves us from all embarrassment which might otherwise have arisen from the decisions in the House of Lords.

The material facts of the present case were these:—There was a general meeting of the shareholders, convened in the usual way, at which a report was made by the directors distinctly informing the shareholders of the forfeiture or cancellation of these 400 shares, and of the diminution of the capital of the company of which the shareholders would derive the benefit, and of the proposed amalgamation or absorption of the original company into the Sombrero Company. The transfer from the old to the new company took place upon the footing of that diminution of capital, which to the extent of 4000*l.* was due to the cancellation of the shares in question. The accounts of the Phosphate of Lime Company were produced at that meeting, and the shareholders invited to investigate them, so that every one of them might, if he were so minded, have informed himself of the whole transaction: and no shareholder was called at the trial to say that he had not notice of it. The transfer and cancellation of the 400 shares took place in July, 1867, and down to the month of May, 1870, the shareholders in the extinct company have derived the benefit resulting from the consequent diminution of capital in the increased dividends on their shares in the Sombrero Company. That the jury, under these circumstances, would have found that there was a ratification, if the question had been left to them, I cannot for a moment doubt. The plaintiffs' counsel elected not to go to the jury, but preferred coming to the Court; and all that we can be called upon to say is, whether or not there was evidence of ratification for a jury. I entirely concur with my Brother Willes that it would be inequitable and unjust to come to any other conclusion; and I should have much regretted it if I had felt myself compelled to disturb the verdict which has been entered.

BRETT, J. The first point to be considered in this case is, what was the real effect of the leave reserved at the trial. The case of the plaintiffs was launched, and was mainly attempted to be maintained, upon the supposition that the compromise with the defendants was the result of a fraud on the part of the chairman of the company. That ground entirely failed; and, considering that the shares in question were cancelled so long ago, and that the plaintiffs have had all the benefits of their cancellation, and are now seeking to enforce payment of the 6500*l.* without offering to give back the 400 shares to the defendants or to pay them the dividends, it seems to me to be clear that the real and understood effect of the reservation was that the verdict upon the plea of accord and satisfaction was to stand, unless the Court should be of opinion that there was *no* evidence to support that plea. If, therefore, there was any evidence of ratification so as to bind the company, this rule must be discharged. The question, then, is, whether there was evidence of such a compromise in July, 1866, as was binding upon the company either by reason of the directors having had authority at the time to make the compromise, or by reason of a subsequent ratification by the company with knowledge of the facts. That the directors had authority to make the compromise is a proposition which I think cannot be sustained. The 18th sub-section of article 84 would seem to give the directors a limited authority to make compromises, but not to make such a compromise as this, because it would be contrary to the proviso that "the same be not repugnant to law or to any of the provisions of these articles," and a purchase of shares, which this would seem to amount to, is expressly forbidden by article 19. Although the directors had some authority to make compromises under article 113, I do not think this transaction was warranted by that article. It comes, therefore, to the question whether the act of the directors with reference to these 400 shares was ratified by the company. Now, in order to establish a case of ratification, it seems to me that it was not necessary to prove absolute knowledge on the part of every shareholder. As is pointed out by Lord St. Leonards in

9 Ex 245

Spackman v. *Evans* (1), it was not necessary to shew that every shareholder had actual notice. "It is said," he observes, "that the absent shareholders in this case are not bound by the arrangement unless the appellant can prove that every one of them knew the exact nature of the transaction. How can he prove this at the close of so many years? In *Brotherhood's Case* (2), it was held that they had notice,—not that, in point of fact, such notice was proved." It is impossible to prove that every shareholder had notice or such a knowledge of the facts as amounts to notice. It is sufficient to shew that facts were made known to the shareholders, into the effect of which they might and ought to have inquired, and to which they ought to have objected at the time, unless they intended to adopt the transaction. I think there was such evidence here. On the 5th or 6th of March, 1867, a meeting of the shareholders in the Phosphate of Lime Company was held for the purpose of considering the expediency of the absorption or transfer of that company to the Sombrero Company, with a diminished capital; and at that meeting a report was read in which it was stated, amongst other things, that that diminution of capital had been effected "partly by shares cancelled owing to the abandonment of the Lagrosan purchase, and partly *by shares forfeited for non-payment of calls*." In order to effect a diminution of the capital, the shares under both those heads must have been cancelled. Mere forfeiture without cancellation would not have had that effect. The validity of the transfer or absorption adopted or authorized at that meeting has never been called in question. At that same meeting a copy of the accounts was put in and submitted to all the shareholders. That fact distinctly appears upon my notes. It was not like the case of the mere production of a ledger into which the shareholders could have no opportunity of looking at the time. Unless the shareholders intended to adopt the transaction, they should have inquired into the circumstances under which the cancellation took place. If they had done so, they would have been told that it was the result of a compromise. The transfer having been made to the new company, dividends have been paid upon the smaller amount of capital, and consequently at an increased rate; and, things having continued in this

---

(1) Law Rep. 3 H. L. 222.

(2) 31 Beav. 365; 31 L. J. (Ch.) 861. 8 Jur. N. S. 1105

1871

PHOSPHATE OF LIME CO. *v.* GREEN.

state for two or three years, the company now seeks to recover from the defendants the sum advanced to them in 1866, and from which the directors had absolved them in consideration of the cancellation of the 400 shares; and this without giving them back the shares or paying them the dividends which would have accrued thereon. Taking all these facts into consideration, it seems to me that there was abundant evidence to justify the jury in saying that the company (that is, the shareholders), with knowledge of all the circumstances, ratified and adopted what had been done by the directors, and that the plea of accord and satisfaction was proved.

Rule discharged.

Attorneys for plaintiffs: *Mercer & Mercer.*
Attorneys for defendants: *Stevens, Wilkinson, & Harries.*

END OF MICHAELMAS TERM, 1871.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

HILARY TERM, XXXV VICTORIA.

ANDERSON AND OTHERS *v.* THE PACIFIC FIRE AND MARINE INSURANCE COMPANY.

1872
Jan. 15.

10 QB 164

Marine Insurance—Misrepresentation of a Material Fact.

On effecting an insurance on freight from Belize to R. Point on the Honduras coast (a place the exact locality of which was not known to either party) and thence to London, the agent of the assured produced and read to the agent of the assurers a letter which the owners of the vessel had received from the captain from Belize, in which R. Point was thus described:—"It is considered by the pilot here as a good and safe anchorage, and well sheltered. I have been out and seen the place, and consider it quite safe." It was admitted that this statement of the captain was made bonâ fide; but there was evidence that R. Point was not at the particular season a safe anchorage.

In an action upon the policy, for a total loss, the judge told the jury that in his opinion the letter did not amount to a statement of a fact, but merely of an opinion; and he left two questions to them,—1. Was the letter read to D., the agent of the assured? 2. Did the captain and the pilot consider that R. Point was a safe anchorage? The jury answered both questions in the affirmative, and a verdict was entered for the plaintiffs:—

Held, no misdirection, and that the verdict was warranted by the evidence.

THIS was an action upon a policy of insurance on chartered freight of the ship *Clarendon*, valued at 1000*l.*, from Belize to

Rendez-vous Point, in the island of Turneffe, back to Belize, thence to other ports, and finally to London.

The cause was tried before Brett, J., at the sittings in London after last term. The facts were as follows:—The plaintiffs are merchants in London, and the owners of the ship *Clarendon*. The defendants are an insurance company in London. Rendez-vous Point, mentioned in the policy, is at the north of Turneffe, an island on the Honduras coast about twenty miles from Belize, off which there is a dangerous coral reef. A vessel called the *Gibraltar*, laden with a cargo of mahogany, had been wrecked there, and the *Clarendon*, which was then lying at Belize, was, on the 30th of November, 1870, chartered to proceed to the spot to recover the mahogany and bring it back to Belize, and thence to London, at a freight of 3*l*. 10*s*. per ton, which was about 20*s*. per ton beyond the ordinary rate of freight. The captain, by letter of the 3rd of December, informed his owners of his having entered into that charterparty, and requested them to effect an insurance on freight. In that letter, which was received in London on the 28th of December, the captain thus described Rendez-vous Point: "It is considered by the pilot here as a good and safe anchorage, and well sheltered. I have been out and seen the place, and consider it quite safe." On the day following the receipt of that letter, one Bruce, the plaintiffs' clerk, went to the office of the defendants in order to effect the insurance. He saw Drummond, the principal manager of the company. There was a conflict of evidence as to what passed at that interview; Drummond stating that Bruce told him that Rendez-vous Point was a safe anchorage, and that his principals had received a letter to that effect from the captain; and Bruce stating that he produced the captain's letter and read Drummond the extract above set out, adding no statement of his own, that Drummond asked him whereabouts Rendez-vous Point was, and he told him he did not know, and that Drummond took time to consider, and next day accepted the insurance at a rate somewhat higher than the ordinary rate of insurance from Belize. So entirely ignorant were both parties at the time of the name and position of Rendez-vous Point, which does not appear in the ordinary charts, though it is the point of departure for vessels sailing from Belize for Europe, that it was called in the slip

"Rendennis Point." The policy was dated the 7th of January, 1871.

The *Clarendon*, in pursuance of the charterparty, proceeded to Rendez-vous Point, and the captain with a pilot went in a boat through an opening in the reef, and, finding what they considered good holding ground, took the vessel in and anchored her. The spot where she lay, though sheltered by the reef from the waves, was not sheltered from wind. After she had been there eight or nine days, a storm arose, and the vessel was totally lost.

There was evidence on the part of the defendants that Rendez-vous Point was a dangerous place for a vessel to anchor during the hurricane months, it being exposed to what are called there the "northers." It was conceded that the conduct of the assured and also of the captain was perfectly bonâ fide; but it was contended that in what passed between Bruce and Drummond when the insurance was effected there was a concealment or a mistatement of a material fact, so as to vitiate the policy.

The learned judge left it to the jury to say,—first, was the letter of the 3rd of December, 1870 (that is, the material part of it), read to Drummond?—secondly, did the captain and the pilot consider that Rendez-vous Point was a safe anchorage? The jury answered both questions in the affirmative; and the learned judge thereupon said, there was no concealment; and directed the jury to find for the plaintiffs.

Prentice, Q.C. (*J. P. Murphy* with him), moved for a new trial, on the ground of misdirection and that the verdict was against evidence. The substance of the representation made by Bruce to Drummond was that Rendez-vous Point was a safe anchorage, and well sheltered; and this all the evidence negatived. After the finding of the jury, it must be taken that the material part of the captain's letter was read to Drummond. But the reading of that letter by the plaintiffs' clerk amounted to a representation by him that he believed the fact to be as therein stated. It is the same as if the captain had gone to the office himself and made the statement.

[BRETT, J. The question is, did Bruce assert that it was a safe anchorage, or only that the pilot and the captain thought it so?]

Ionides v. *Pacific Insurance Company* (1) is an authority to shew that what passed substantially amounted to a representation of the fact by Bruce. Blackburn, J., delivering the judgment of the Court, says (2): "It was argued that a representation, if only as to an expectation or belief, is substantially complied with if the assured really had honestly entertained that expectation on sufficient grounds, and that the representation that he 'thought' the ship a Norwegian ship was literally true. We think this expression tantamount to an assertion that she was the Norwegian."

[WILLES, J. You must make out that the statement contained in the captain's letter is not merely an expression of opinion, but an assertion of a fact].

The evidence shews that the captain could not really have believed that Rendez-vous Point was a safe anchorage.

WILLES, J. This is an action on a policy of insurance on freight of a ship called the *Clarendon* from Belize to Rendez-vous Point, thence back to Belize, and thence to London. The vessel was lost in the course of that voyage, and the defendants, who underwrote the policy, now seek to be discharged from liability as insurers, on the ground of an alleged material misrepresentation by the assured to their agent on the occasion of the policy being entered into. There is no doubt that a material misrepresentation, though perfectly honest at the time, made with the intent that it should be acted upon by the assurer, and which has led to the policy being granted, will defeat the policy. The rule as to the good faith which is required to be observed on the effecting a policy of insurance is so strict that the assured is bound to make known to the underwriter all the information in his power which is not within the ordinary knowledge and experience of an underwriter; and, further, that, if a material fact which is stated to the underwriter turns out to be untrue, or a fact which is material to be stated is concealed from the underwriter, the policy is void, notwithstanding the assured may have acted with perfect good faith and honesty of intention. In the present case there was no concealment of anything known to the assured. The jury have found that the agent of the assured, at the time of effecting the policy, read to the defendants' manager all that the assured themselves knew as to the voyage, and especially all that they knew as to the security of the anchorage at Rendez-vous Point. He read to him the letter from the captain of the *Clarendon*, in which he said: "It is considered by the pilot here as a good and safe anchorage, and well sheltered. I have been out and seen the place, and consider it quite safe." It is said that that was a misrepresentation; and I think it must be assumed for the present purpose, that, if that is to be taken to be a statement by the master that Rendez-vous Point was a safe anchorage and well sheltered, that was a misstatement, because there was abundant evidence that it was not a good and safe anchorage; and on that the learned judge did not ask the jury to pronounce any opinion. The question, therefore, becomes this, whether the statement of the master in that letter amounts to an absolute statement of a fact or only to a statement of opinion. If the latter, it may be that, if it was an opinion which the writer of the letter really did not entertain,—a conclusion which the jury would easily have arrived at if they thought no person could honestly have entertained such a belief,—I think the assured would be bound. But any consideration of that kind is excluded by the finding of the jury, because, in answer to the second question which was put to them, they find that it was an opinion honestly formed. Then, do the words amount to an absolute statement of a fact? I am of opinion that they do not, and that they could not have been so understood by Drummond when he took the risk. Rendez-vous Point does not appear to have been a place very well known to either party. It was, so to speak, a questionable place. All the information the defendants' manager has he obtains from a person who professes not to know anything about it. It was considered by the pilot as a good and safe anchorage; and it was considered by the jury that the pilot so thought it. The rest of the statement means this: "From the information I have received from the pilot, and my own inspection, I consider it quite safe." Fraud being out of the question, I think that is no misrepresentation. Unless the honesty of the captain was to be assailed, I do not see any ground for saying that the jury ought to have come to any other conclusion than they did; and I do not understand from the learned judge that he is dissatisfied with the verdict. I therefore think there ought to be no rule.

---

(1) Law Rep. 6 Q. B. 674.

(2) Law Rep. 6 Q. B., at p. 683.

BYLES, J. I am of the same opinion. The statement in the captain's letter, which the jury find was read to the defendants' agent at the time of effecting the policy, and which they also find to be true, is a representation, not that Rendez-vous Point was a safe anchorage, but that two persons considered it so. There being no fraud, I think there should be no rule.

GROVE, J. I am of the same opinion. Mr. Prentice says that the words are to be read as if they were an assertion by the plaintiffs' agent that the spot in question was a safe anchorage, and that the insurance was effected upon the faith of that representation. I do not think that is the true effect of the production of the letter; and I think the words exclude Mr. Prentice's conclusion. The real question in the case referred to of *Ionides* v. *Pacific Insurance Co.* (1) was the identity of the vessel on which the goods were shipped,—whether it was the *Socrates,* a new Norwegian vessel, or the *Socrate,* an old French vessel. Just before the passage in the judgment cited by Mr. Prentice, Blackburn, J., says: "Though we see no reason to doubt that the jury were quite right in finding that both parties were intending to insure the goods by the ship on which they were actually shipped, yet, when we find it not disputed that the one party expressly asked the question whether the ship was the Norwegian ship *Socrates,* and was told by the other party that he thought it was, we cannot think that there was any evidence on which the jury could properly find that the defendants entered into a contract to insure any other ship than the *Socrates.* The most that could be legitimately found was that there was no contract, the parties not being ad idem. And we think also that, if the representation was made, however honestly and innocently, that the ship was a new ship, when, in fact, she was an old one, the policy was vitiated thereby, for the age of the vessel must be material in considering the premium." I do not think that case has any bearing upon the present. All that the representation here amounts to is the opinion of the captain, not recklessly formed, but founded upon what he fairly deemed to be competent knowledge of the pilot and his own personal observation.

---

(1) Law Rep. 6 Q. B. 674.

BRETT, J. Upon the whole, I think I left the right questions to the jury. They were these:—"1. Did Bruce read to Drummond the extract from the captain's letter? 2. Is the representation in that extract true? 3. Did Bruce, without reading the extract to Drummond, state to him that the place to which the ship was going was a good, well-sheltered, and safe anchorage? 4. If yes, was the place a good, well-sheltered, and safe anchorage, in the sense in which the statement was understood by Drummond?" The jury answered only the first two questions. I thought that concluded the case, and therefore did not press them to answer the others. The contest at the trial was whether the letter was read or not. Although neither Bruce nor Drummond seemed to know anything about Rendez-vous Point, the island itself is well known; and Rendez-vous Point is the point of departure from Belize. The insurance was from Belize to Turneffe to take the cargo of a wrecked vessel. The agent of the assurers therefore knew it was an unusual risk that he was asked to take; and an unusual premium was paid. The substance of what I left to the jury was, what was the meaning of the extract, and was the statement true. I thought the interpretation of the letter was for the Court; and I stated my view of it, viz. that the pilot and the captain, after examining it, thought the anchorage a safe one. The jury agreed with me. I cannot doubt that that was the true meaning of the letter, and that it was so understood by Drummond. Although the reef did not protect the vessel from the wind, there was evidence that it afforded a protection against the waves. I see no reason to be dissatisfied with the verdict.

Rule refused.

Attorneys for defendants: *Holmer, Robinson, & Stoneham.*

1872
Feb. 10.

[IN THE EXCHEQUER CHAMBER.]

VIGAR *v.* DUDMAN.

Tithes—Modus, Breach of—Conversion of Land into "Tillage," what amounts to —Garden and Orchard Accessories of a House.

An award made under a private enclosure Act, commuting the tithes of a parish, set out the terms of a modus, preserved by the Act, by which certain lands in the parish were exempted from the payment of tithes in kind. By the terms of the modus, as set out, the exemption ceased during such time as the lands or any part thereof might be converted into "tillage," and the award provided that in such case the lands should be subject to a tithe rent-charge of a specified amount. A field of about an acre, which was among the lands subject to the modus, was dealt with as follows: A house was built upon a portion of it, and a further portion, to the extent of twenty-two perches, was at the same time converted into a garden by the then owner who fenced off the house and garden from the rest of the field, the remaining portion being used as an orchard:—

Held, affirming the judgment of the Court of Common Pleas, that the manner in which the field had been dealt with did not amount to a conversion of it, or any part of it, into "tillage."

Affirmed L R 6 H L 212.

Error from the judgment of the Court of Common Pleas in favour of the plaintiff upon a special case. (1)

The facts are set out in the report in the court below.

Edwyn Jones (*Philbrick* with him), for the defendant. The modus in this case was only for tithe of hay. (2) The parson would therefore have been entitled to tithes in kind upon any other production of the land, e. g., fruit or vegetables, but for the award. The commissioner had no power by his award to deprive the parson of any right he would previously have had to tithes, but only to commute such tithes to a money payment.

[Cleasby, B. The defendant can only claim under the award; so that the only point is as to the meaning of the word "tillage" as used therein.]

That must be admitted; but in construing the award it must be taken that the commissioner used the word "tillage" in such a sense as not to exceed his powers. "Tillage" must therefore include any change of cultivation which would have entitled the parson to tithes in kind.

---

(1) Law Rep. 6 C. P. 470.

(2) This appeared to be so from the case, though it is not stated in the report of the case in the court below, inasmuch as no point was then made of it in the argument.

[BLACKBURN, J. It may be that it would have been more correct if the commissioner had said, "when not meadow-land," instead of "when converted into tillage;" but we must construe the award as made, and the question is whether the conversion of the land into a house with a small garden and orchard accessory thereto is a conversion into "tillage."]

The word "tillage" may very well have a wider meaning than cultivation with a view to the production of corn and similar crops. He cited *Bedingfield* v. *Feak.* (1)

A. Charles, for the plaintiff, was not called upon.

COCKBURN, C.J. We are all of opinion that the judgment of the Court below must be affirmed. The only question is whether this land was converted into "tillage," and for the reasons given by the Court below we think that it was not.

BLACKBURN and MELLOR, JJ,, and CHANNELL, PIGOTT, and CLEASBY, BB., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Vizard & Co.*
Attorneys for defendant: *Lowless, Nelson, & Jones.*

---

(1) Cro. Eliz. 467; 1 Eag. & Young, 118.

1872
Jan. 30.

Ex parte KING.

Practice—Affidavit—Omission of Addition of Deponent—Irregularity—Waiver—R. G. 138. H. T. 1853.

The omission of the deponent's addition in an affidavit constitutes an irregularity only and may be waived.

Where a rule nisi had been obtained to strike two attorneys in partnership off the rolls and on shewing cause against the rule the two appeared separately, and counsel for one took objection to the affidavit on which the rule had been obtained on the ground that it did not give the deponent's addition, but counsel for the other waived the objection so far as his client was concerned:—

Held, that though the rule must be quashed so far as it related to the one, the counsel for the other might proceed to shew cause against the rule so far as it concerned his client.

Rule obtained on behalf of Mr. King, calling upon two attorneys (partners) to shew cause why they should not be struck off the rolls.

Prideaux, Q.C., appeared on behalf of one of the attorneys to shew cause against the rule, and objected that the affidavit of Mr. King and his wife, upon which the rule was obtained, did not give the addition of Mr. King, in accordance with the 138th rule of Hilary Term, 1853.

Lopes, Q.C. (*Patchett* with him), who appeared to shew cause on behalf of the other attorney, expressed his desire to waive any objection to the affidavit, and proceed with the case so far as it affected his client.

Kenealy, Q.C. (*E. P. Wood* with him), in support of the rule.

Willes, J. We are all of opinion that though the rule must be quashed, so far as it relates to Mr. Prideaux's client, the argument of the matter may proceed with regard to Mr. Lopes' client. The 138th rule of Hilary Term, 1853, directs the mode of describing the party making an affidavit. It is not a statutory rule, but a mere direction of the Court. The breach of it is only an irregularity, and as such may be waived. It might be otherwise if the rule had said that the affidavit should not be read or made use of in any matter, unless the rule were complied with, as is the case with the 140th rule of Hilary Term, 1853. There is no reason for rejecting this affidavit on the ground that perjury could not be assigned upon it, for it is clear from 3 Russell on Crimes, by

Greaves, 104, 105, that such an objection as this could not be a defence to a prosecution for perjury.

Byles, Brett, and Grove, JJ., concurred.

Lopes, Q.C., accordingly proceeded to shew cause, and the Court ultimately referred the matter to the Master for his report upon it.

Referred to the Master for his report.

Attorney for applicant: *Parsons.*
Attorneys for respondents: *Bridges, Sawtell, & Co.*

RICHARDSON and SISSON *v.* THE NORTH EASTERN RAILWAY COMPANY.

Jan. 31.

Railway Company—Carriers—Bailee—Negligence.

Post 662
14 ChD 63

A valuable greyhound was delivered by its owner to the servants of a railway company, who were not common carriers of dogs, to be carried, and the fare demanded was paid. At the time of delivery the greyhound had on a leathern collar with a strap attached to it. In the course of the journey, it being necessary to remove the greyhound from one train to another which had not then come up, it was fastened by means of the strap and collar to an iron spout on the open platform of one of the company's stations, and, while so fastened, it slipped its head from the collar and ran upon the line and was killed:—

Held, that the fastening the greyhound by the means furnished by the owner himself, which at the time appeared to be sufficient, was no evidence of negligence on the part of the company.

Stuart v. *Crawley* (2 Stark. 323) distinguished.

Appeal against a decision of the County Court of Westmoreland, holden at Appleby, in an action brought by the plaintiffs, joint owners of a greyhound bitch, to recover 50*l.* damages against the North Eastern Railway Company, for the loss of the animal through the alleged negligence of the company's servants.

1. On the 19th of February, 1870, the greyhound was taken by Sisson to the defendants' station at Temple Sowerby, for the purpose of being conveyed thence to Morpeth, another station on the defendants' line of railway. Sisson applied to the collector at Temple Sowerby station, and stated that he required the greyhound to be conveyed to Morpeth. He paid the fare which the collector demanded, and gave the greyhound into the charge of the guard of the train by which she was to be conveyed on her journey.

1872

RICHARDSON
v.
NORTH
EASTERN
RAILWAY CO.

2. The plaintiffs did not declare the value of the dog, and paid no extra charge for its conveyance. No ticket was issued. The greyhound, when delivered to the guard, had round her neck a collar of leather, and was clothed with a sheet, which, however, did not so cover the collar as to prevent its being examined. The bitch was proved to be of the value of seventy guineas. She was safely carried to Kirkby Stephen station, where the train from Temple Sowerby stopped. The remainder of the journey to Morpeth was intended by the defendants, for their own convenience, to be performed in another train, which, on its arrival from Tebay, was to proceed from the Tebay side of Kirkby Stephen station; the train from Temple Sowerby arriving at the other side (known as the Eden Valley side) of the Kirkby Stephen station. The greyhound was taken from the van in which up to that point she had been carried, and was taken from the Eden Valley side of the platform to the Tebay side, to await the arrival of the train from Tebay, then due. The train from Tebay being a few minutes late, the greyhound was fastened by the company's servant to an iron spout by a strap which one of the plaintiffs before delivery to the defendants had attached to her collar; and, having been so fastened, she was left alone to await the arrival of the train. Within three minutes afterwards she slipped her head through the collar, and escaped, and ran away down the line. The next day she was found dead, having been run over by a train.

3. At the time Sisson brought the greyhound to Temple Sowerby station, a bill, a copy of which marked B. was annexed to the case, was exposed on a board in the open platform shed of the station, and another bill, a copy of which marked A. was also annexed to the case, was tacked to the wall inside the passengers' waiting-room. The notice marked B., but which had no reference to dogs (1), could be easily seen by any person entering the open

---

(1) The material part of this notice was paragraph 9, which was as follows:—

"The said company hereby give notice and declare that they never have been, and are not, and decline to become, common carriers of horses, cattle, sheep, pigs, and other animals, and will only undertake the carriage thereof upon a special contract in each case first entered into by them with the owner or person sending or delivering the same, the special terms whereof may be learnt on application to the company's collector at the station, and will appear in the note at the foot of or indorsed upon the ticket or memorandum of each such contract issued or made by

1872

RICHARDSON v. NORTH EASTERN RAILWAY CO.

platform shed where tickets are given; but the printed paper marked A., which was a time-table, and contained a marginal note about dogs (1), could only be seen by persons who had entered the waiting-room; but there was no evidence to shew that Sisson had, and Sisson swore that he never had, seen or heard of either of these notices, or of the terms contained therein.

4. The defendants are not common carriers of dogs; but it was proved that on one previous occasion they had for hire carried the same dog for the plaintiffs, when no ticket was given; and there was no evidence that the plaintiffs had on that occasion any knowledge of the above notices.

5. It was contended for the plaintiffs, that the defendants having undertaken, for valuable consideration, to carry the dog safely from Temple Sowerby station to Morpeth, on the complete delivery of the dog to them they became responsible for the security of the dog, and the dog then remained at the risk of the defendants, who were bound to lock the dog up or take other proper means to secure it; that the defendants were guilty of negligence, in the first place, in not making the strap secure, and, in the second, in tying the dog to an iron spout in the open station of Kirkby Stephen and leaving it alone in a strange place, amongst strangers, instead of keeping it either in hand or in the van of the Temple Sowerby train or in a building until the Tebay train arrived, and then transferring the dog direct from the Temple Sowerby train to the Tebay train; that there was no notice to the plaintiffs of any special conditions by which the company limited their liability;

---

him, and according to which alone the company authorize him to contract on their behalf."

(1) The note in question was as follows:—

"HORSES, CARRIAGES, DOGS. The company are not carriers of horses, cattle, dogs, and other animals, which are received, forwarded, and delivered solely on and subject to the following conditions, &c., &c.

"The company will not accept dogs for conveyance unless they have proper chains and collars attached, and then only upon condition that they are not responsible for loss of or injury to the animals in the event of these fastenings proving insufficient; and they will not receive dogs for conveyance except on the terms that they shall not be responsible for any greater amount or damages for the loss thereof or injury thereto beyond the sum of 2*l*., unless a higher value be declared at the time of delivery to the company, and a percentage of 5 per cent. paid upon the excess of value so declared."

1872

RICHARDSON v. NORTH EASTERN RAILWAY CO.

and that, having been guilty of negligence, the defendants could not take advantage of their own wrong or avail themselves of any notice to the purport or effect of the notices above referred to.

6. It was contended for the defendants that the loss arose through no negligence on their part, but from the insecurity of the collar placed on the greyhound by the plaintiffs; and that, the defendants not being common carriers of dogs, but only professing to carry dogs on the terms stated on the bills marked A. and B., they were not liable at all under the circumstances, and in any event could not be liable in damages beyond 2*l.*

7. The judge gave a verdict for the plaintiffs for the full amount claimed, viz. 50*l.*, on the several grounds following:—The defendants were guilty of negligence in not seeing that the strap was properly secured when the dog was in their charge, and also in leaving the dog alone amongst strangers in a strange place in the station at Kirkby Stephen tied to a spout from which it almost immediately escaped, instead of securing it in the van or in some other safe place, they being responsible for its security. The collar might be sufficiently fastened for ordinary circumstances; but the dog, being left alone, fought itself loose, which in all probability would not have happened if it had been conducted by one of the company's servants from one van to the other. The printed paper A. suggested as a notice, is not a notice within the meaning of the statute (17 & 18 Vict. c. 31, s. 7) for several reasons, viz.: It does not purport to be a public notice, but merely a time-table shewing the times of arrival and dispatch of trains; it is not signed by any authority of the company: the paragraph applying to dogs is a mere marginal note, and is in no way a leading feature in the document: the notice B. does not apply to dogs unless specifically named, and is not in conformity with the Railway and Canal Traffic Act, but is in small print, and is directly at variance with the requirement of the statute that such a notice shall be in legible characters. There should have been a special contract signed by the parties. In *Peek* v. *North Staffordshire Ry. Co.* (1), the House of Lords held that "all the parts of s. 7 of 17 & 18 Vict. c. 31 must be read together; and, not only must the terms limiting liability be reasonable, but they must be embodied in a special

---

(1) 10 H. L. 473. 9 Jur N S 914

1872

RICHARDSON
v.
NORTH
EASTERN
RAILWAY CO.

contract in writing signed by the owner or sender of the goods." It is no defence in this case for the company to say that the dog was delivered to them so near to the time of the departure of the train as not to afford time for giving a ticket, as they might well have refused to take it until the next train.

The question for the opinion of the Court was, whether or not the verdict should stand.

Shield, for the defendants. The 7th section of the Railway and Canal Traffic Act (17 & 18 Vict. c. 31) has no application to this case. The company not being common carriers of dogs, they can only be liable as bailees on the terms of the notices A. and B., upon which terms alone the collector had authority to contract on their behalf; and, if he exceeded his authority in this respect, the company are not responsible: *Belfast and Ballymena Ry. Co. and Londonderry and Coleraine Ry. Co.* v. *Keys.* (1) Assuming there was a contract here, there was no evidence of negligence on the part of the company or their servants; and, if there was, the negligence of the plaintiffs themselves in delivering the greyhound to the company with a collar so insecurely fastened as to enable her to escape, materially contributed to the loss. *Slim* v. *Great Northern Ry. Co.* (2) was also referred to.

Kemp, for the plaintiffs. Contributory negligence is for the jury; and the judge must be taken to have negatived it. The case finds that the company are not common carriers of dogs; but they are still liable, as common bailees, for negligence. Neither of the notices having been brought home to the knowledge of the plaintiffs, and the person to whom the greyhound was delivered being in the apparent position of one having authority to contract for the company, and it having been proved that the greyhound had on a former occasion been conveyed by the company for the plaintiffs upon the same terms, it is not competent to them now to set up a contract different from that which would ordinarily be implied from the circumstances. A dog, although not specifically mentioned in the proviso as to the limitation of liability, is within s. 7 of 17 & 18 Vict. c. 31: *Harrison* v. *London and Brighton Ry. Co.* (3)

---

(1) 9 H. L. 556. 8 Jur N S 367

(2) 14 C. B. 647; 23 L. J. (C.P.) 166. 18 Jur 1119

(3) 2 B. & S. 122; 29 L. J. (Q.B.) 209. 8 Jur N S 740

1872

RICHARDSON
v.
NORTH
EASTERN
RAILWAY CO.

Shield, in reply. The 7th section of 17 & 18 Vict. c. 31 is applicable only to common carriers in respect of things as to which they hold themselves out as common carriers. *Van Toll* v. *South Eastern Ry. Co.* (1), *Cahill* v. *London and North Western Ry. Co.* (2), and *Zunz* v. *South Eastern Ry. Co.* (3), were referred to.

WILLES, J. This case involves a question of considerable importance with reference to the duty of railway companies to give notice where goods are to be carried only upon special terms, and with reference also to the ostensible authority of their collectors to make contracts which shall be binding upon them. We will therefore take time to consider it.

Cur. adv. vult.

WILLES, J., delivered the judgment of the Court.

This case was argued before my Brother Montague Smith and myself at the sittings in banc after last Trinity Term; and it has stood over longer than we intended, in consequence of the difficulty of communicating with him arising from the recent changes in the constitution of the Court.

It was an appeal against a judgment given by a county-court judge in favour of the plaintiffs for the sum of 50*l.*, being the extreme amount to which his jurisdiction in such a case extends, in respect of the loss through the alleged negligence of the servants of a railway company of a valuable greyhound bitch which had been delivered to them by the plaintiffs to be carried by their railway. The facts were these:—The greyhound was taken by one of the plaintiffs to the defendants' station at Temple Sowerby, for the purpose of being conveyed thence to Morpeth, and there delivered to the guard of the train by which she was to travel, the fare demanded by the collector having been duly paid. No declaration of the value of the greyhound was made, or any extra sum paid for insurance; nor was any ticket given to the plaintiffs. At the time she was delivered to the guard, the greyhound had a leather collar round her neck, to which was fastened a strap. The company only professed to carry dogs upon the terms of certain

(1) 12 C. B. (N.S.) 75; 31 L. J. (C.P.) 241. 8 Jur N.S. 1213.

(2) 10 C. B. (N.S.) 154; 30 L. J. (C.P.) 289. 7 Jur N.S. 1164, 8 L.T. 1063

(3) Law Rep. 4 Q.B. 539.

notices; and it was insisted before the judge of the county-court, as it was again insisted before us upon the argument of the appeal, that the guard had no right to receive the dog upon any other terms than those contained in the notices. In the view we take of the case, it becomes unnecessary to discuss that, because it is expressly found in the case that the company are not common carriers of dogs, and therefore they stand in the position of ordinary bailees, and are only liable in respect of some negligence established against them by evidence, and are not liable if the loss was occasioned or contributed to by the negligence of the person who delivered the dog to them to be carried. It was contended on the part of the company in the court below that there had been no negligence on their part, or that at all events there was contributory negligence on the part of the plaintiffs; and, with a view to see whether that is so or not, it is necessary to state the facts further. When the train was on its way, and had arrived at Kirkby Stephen station, it was necessary for passengers and goods intended for Morpeth to be removed to another train on the other side of the station. The train by which the rest of the journey was to be performed not being ready, the guard by means of the strap which was attached to her collar fastened the greyhound to an iron spout on the platform, to wait until the train came up. The fact of her having been fastened to an iron spout has nothing to do with the decision of the case: it is not stated whether the spout was sufficient for the purpose or not. She was fastened by means of a strap which one of the plaintiffs had himself attached to the collar for the purpose of securing her. Being so fastened, she slipped her head through the collar and ran on to the line and was killed by a passing train.

The county-court judge decided that the defendants were responsible for the escape and consequent destruction of the dog, on the ground that they by their servants were guilty of negligence and that there was no contributory negligence on the part of the plaintiffs. We are clearly of a different opinion. The county-court judge in deciding as he did appears to have proceeded upon a supposition that the case fell within the ruling of Lord Ellenborough in *Stuart* v. *Crawley*. (1) That case, however, in our judgment

---

(1) 2 Stark. 323.

1872

RICHARDSON
v.
NORTH
EASTERN
RAILWAY CO.

differs in some essential particulars from the present. It was an action against a carrier of goods by the Grand Junction Canal for negligence in losing a valuable greyhound which had been delivered to him to be carried from London to Harefield Lock. It appeared that the servant of the plaintiff took the dog to the defendant's warehouse with a string about his neck, and the defendant's bookkeeper gave a receipt acknowledging the delivery; that the dog was afterwards tied by the cord to a watch-box, but within half an hour afterwards slipped his head through the noose, and was lost. It was sought to charge the plaintiff with negligence in not delivering the dog to the defendant's bookkeeper in a state of security, he having no collar, but merely a cord round his neck, which was insufficient; and the case was sought to be assimilated to that of a delivery of goods imperfectly packed. But Lord Ellenborough held that the defendant was responsible. "The case," he said, "was not like that of a delivery of goods imperfectly packed, since there the defect was not visible; but in this case the defendant had the means of seeing that the dog was insufficiently secured. After a complete delivery to the defendant, he became responsible for the security of the dog: the property then remained at the risk of the defendant, and he was bound to lock him up or to take other proper means to secure him. The owner had nothing more to do than to see that he was properly delivered, and it was then incumbent on the defendant to provide for his security." That case is obviously different from this. Here, the greyhound when delivered to the guard had a leathern collar on with a strap attached to it, indicating that the strap was the thing by which she was to be secured. If it was negligence on the part of the guard to fasten her by the strap, it was a negligence which was suggested by the person who delivered her to him without notice that the fastening was an unsafe one. There are, therefore, two important distinctions between that case and the present, —first, that there the defendant was a common carrier, and here the defendants are not,—and, secondly, that, when the dog was delivered to the defendants' servant, he had the means of seeing that it was insufficiently secured, whereas here the mode of securing the dog was that which is ordinarily adopted, viz. by a collar and strap.

My Brother Smith and myself are therefore of opinion that the decision of the county court cannot be sustained, and must be reversed. In this we only follow the course pursued by this Court in the case of *Talley* v. *Great Western Ry. Co.* (1) : and, if the rule laid down in *Schroder* v. *Ward* (2) were followed, it ought to be reversed with costs; but we do not feel inclined to act upon that rule here, because there was some laxity on the part of the defendants' servants in receiving the dog to be carried without giving a ticket. The defendants would probably not press for costs.

Judgment reversed.

Attorneys for plaintiffs: *Kynaston & Gasquet, for Bleaymire & Shepherd, Penrith.*

Attorney for defendants: *R. J. Jarvis, for Hutchinson & Lucas, Darlington.*

---

(1) Law Rep. 6 C. P. 44.

(2) 13 C. B. (N.S.) 410; 32 L. J. (C.P.) 150.

1872

Mollett
v.
Robinson.

1 CPD 375.
— 687,
4 QBD 346

[IN THE EXCHEQUER CHAMBER.]

MOLLETT and Others *v.* ROBINSON.

Principal and Agent—Contract by Brokers—Usage of Market.

The defendant, a merchant in Liverpool, employed the plaintiffs, tallow-brokers in London, to buy tallow for him in the London market.

In an action brought by the plaintiffs against the defendant to recover the loss upon the re-sale of the tallow, which the defendant had refused to accept, it was proved "that there exists an established custom in the London tallow-trade, for brokers, when they receive an order from a principal for the purchase of tallow to make a contract or contracts in their own names without disclosing their principals, and also to make such contracts either for the specific quantity of tallow so ordered, or to include such order with others they may have received in a contract for the entire quantity, or in any quantities, at their convenience, at the same time exchanging bought and sold notes with the selling brokers, and passing to their principals a bought-note for the specific quantity ordered by them; and that, when a broker so purchases in his own name, he is personally bound by the contract; and that, on the usual settling days, the brokers balance between themselves the purchases and sales so made, and make or receive deliveries to or from their principals, as the case may be, or, if their principals refuse to accept or deliver, then to sell or buy against them, as the case may be, and charge them with the loss, if any, or, if delivery is not required on either side, then any difference which may arise from a rise or fall in the market is paid by the one to the other."

All the dealings between the plaintiffs and the defendant were carried out in accordance with the above custom, which, however, does not exist in Liverpool, and was unknown to the defendant:—

Held, by Kelly, C.B., Channell, B., and Blackburn, J., that the employment of the plaintiffs by the defendant was an employment to buy according to the usages of the London tallow-market, and that the defendant was bound by those usages, notwithstanding he was ignorant of their existence.

Held, by Mellor and Hannen, JJ., and Cleasby, B., that the plaintiffs, having been employed as brokers to make the contract for the defendant, and having professed to act as brokers, and charged brokerage for their services as such, were not entitled, as against a person unconnected with the London tallow-market and ignorant of its usages, to set up a custom or usage that they should fill a different character, and become themselves principals in the transaction instead of brokers.

Rev'd in H of L. LR 7 HL. 802.

Appeal by the defendant against the decision of the Court of Common Pleas in discharging a rule to set aside a verdict found for the plaintiffs and to enter a nonsuit.

The pleadings are sufficiently set out in the report of the case in the court below. (1) The material parts of the appeal case were as follows:—

6. The plaintiffs are sworn brokers carrying on business in the city of London under the firm of Mollett, Bull, & Unsworth, and the defendant is a merchant at Liverpool. The plaintiffs and the defendant had previously to the transactions in question in this cause had several dealings together in the buying and selling of tallow.

7. On the 2nd of April, 1869, the defendant met the plaintiff Unsworth at Liverpool, and gave him an order to buy for him 50 tons of tallow, June delivery, at 46*s.* 6*d.*, and the same day Unsworth telegraphed to his firm in London to execute the order.

8. On the same day, the plaintiffs, after the receipt of the telegram in London, wrote and sent to the defendant the following letter and bought-note:—

"London, 2nd April, 1869.

"Sir,—We have received a message to buy for your account 50 tons tallow, June delivery, at 46*s.* 6*d.*, and which we succeeded in doing, since when our market has further improved, and we close 46*s.* 9*d.* @ 46*s.* 9*d.* for April, June 47*s.*, nearest price June 46*s.* for October, December."

"London, 2nd April, 1869.

"C. J. Robinson, Esq.—We have this day bought for your account 50 tons nett in casks of St. Petersburg first sort yellow candle tallow, new, and of the brack of 1868-9, at 46*s.* 6*d.* per cwt. &c., &c.

(Signed) "Mollett, Bull, & Unsworth, sworn brokers."

9. On the 28th of April, the defendant sent a further order by telegram from Liverpool to the plaintiffs in London, as follows,—"Messrs. Mollett, Bull, & Unsworth, London. Buy 200 tons tallow for June, best terms:" and on the same day the defendant confirmed this telegram by the following letter addressed to the

---

(1) Law Rep. 5 C. P. 646.

plaintiffs,—"I sent you a telegram this afternoon to buy 200 tons tallow for June on best terms, which I now confirm: 100 tons are for myself, and 100 for a friend of mine; but book them all to me or my firm."

10. On the same day, and in reply to this telegram, the plaintiffs wrote to the defendant a letter inclosing a bought-note, as follows:—

"London, 28th April, 1869.

"Dear Sir,—We thank you for your telegram of to-day, to buy 200 tons tallow for June on best terms. Our market opened very good, and soon 44*s.* 3*d.* was paid for April, and 44*s.* 6*d.* for June; but, just before going on 'Change, we received your message, and, as there was a temporary dullness, we fortunately succeeded in picking up your 200 tons at 44*s.* 3*d.*, and now have much pleasure in inclosing contract."

"London, 28th April, 1869.

"C. J. Robinson, Esq.—We have this day bought for your account 200 tons nett in casks of St. Petersburg first sort yellow candle tallow, new, and of the brack of 1868-9, at 44*s.* 3*d.* per cwt., &c., &c.

(Signed) "Mollett, Bull, & Unsworth, sworn brokers."

11. Upon the receipt of the above-mentioned orders from the defendant, the plaintiffs made purchases of tallow from other brokers in the trade, in the manner hereinafter described.

12. On receiving the defendant's order of the 2nd of April, the plaintiffs entered into a contract with one W. Sharman, a Russia broker trading under the firm of W. W. Simpson & Co., for the purchase of 150 tons of tallow, intending to appropriate 50 out of these 150 tons to the defendant's order, and 100 to another order which the plaintiffs had received from another person; and the plaintiffs made out and sent to Simpson & Co. a sold-note, and received from them a bought-note, in respect of these 150 tons, of which the following are copies:—

"London, 2nd April, 1869.

"Messrs. W. W. Simpson & Co.

"We have this day sold for your account 150 tons nett in casks of St. Petersburg first sort yellow candle tallow, new, and of the brack of 1868-9, at 46*s.* 6*d.* per cwt., &c., &c.

(Signed) "Mollett, Bull, & Unsworth, sworn brokers."

"Brokerage, ½ per cent."

"Bought for account Messrs. Mollett, Bull, & Unsworth, 150 tons nett in casks of St. Petersburg first sort yellow candle tallow, new, and of the brack of 1868-9, at 46*s.* 6*d.* per cwt., &c., &c.

(Signed) "W. W. Simpson & Co."

"Commission, ½ per cent."

13. On receiving the defendant's second order, of the 28th of April, the plaintiffs entered into a contract with Messrs. Rayner & Co. for the purchase of 200 tons of tallow, and into a contract with Simpson & Co. for the purchase of 150 tons of tallow, intending to appropriate to the defendant's second order the 150 tons and 50 tons out of the 200 tons; and on the 28th of April bought and sold notes (in the same form as those above set out) were passed between the plaintiffs and Rayner & Co. and Simpson & Co.

14. Settlements of transactions in tallow are usually made in London in the months of April, May, and June, respectively; and on the May settlement Sharman, trading under the firm of W. W. Simpson & Co., failed, and was unable to meet his engagements. Thereupon, the plaintiffs and Simpson & Co., having many transactions together outstanding in respect of the sale and purchase of tallow, balanced and settled an account thereof, wherein the quantity of tallow sold was set off against the quantity of tallow purchased by the plaintiffs on account of Simpson & Co., whereby it appeared that the plaintiffs had sold between 100 and 200 tons more than they had purchased on account of Simpson & Co.

16. On the 31st of May and 1st of June, the plaintiffs sent the defendant letters inclosing respectively notices that they were ready to deliver 117 casks or 50 tons of tallow in accordance with the defendant's order of the 2nd of April, 1869, and to deliver 175 casks or 75 tons in part fulfilment of the defendant's order of the 28th of April.

18. On the 8th of June the plaintiffs sent the defendant a letter inclosing a notice that they were ready to deliver 170 casks or 75 tons more tallow in further fulfilment of the defendant's order of the 28th of April. Inclosed were two invoices, one, dated the 7th of June, in respect of the above 175 casks of tallow, and the other, dated the 8th of June, in respect of the 117 casks.

19. On the 9th of June, the defendant acknowledged the receipt of that letter and the inclosures.

20. On the 11th of June the plaintiffs wrote to the defendant a letter, inclosing an invoice in respect of the 170 casks of tallow.

21. On the 14th of June the plaintiffs sent a letter to the defendant, informing him as to the state and prospects of the tallow-market, and suggesting a remittance for the prompt payable the following day.

22. The defendant, having before the 15th of June ascertained that Simpson & Co. had failed and had not themselves tendered the tallow, gave notice to the plaintiffs that he would not accept the tallow.

23. On the 15th of June the plaintiffs sold out the 117 and 175 casks, together making 292 casks or 125 tons of tallow against the defendant, and sent him a letter inclosing a contract of sale, an invoice, and balance-account in respect thereof.

26. On the 22nd of June the plaintiffs, having sold out the last-mentioned parcel of 170 casks or 75 tons of tallow against the defendant, sent him a letter inclosing a contract of sale in respect thereof and a notice that they were ready to deliver 115 casks or 50 tons of tallow to complete the defendant's order of the 28th of April. On the following day the plaintiffs sent the defendant a letter inclosing an invoice and balance-account in respect of the 170 casks.

27. On the 3rd of July, 1869, the plaintiffs sent the defendant a letter inclosing an invoice in respect of the last-mentioned parcel of 115 casks or 50 tons; and on the 6th, the defendant not accepting it, the plaintiffs sold out the same against the defendant, and sent him a letter inclosing a contract of sale and invoice in respect thereof, and an account shewing a balance of 362*l.* 4*s.* 5*d.* in favour

of the plaintiffs against the defendant in respect of the above-mentioned transactions in tallow.

28. The tallow which the plaintiffs gave the defendant notice as aforesaid that they were ready to deliver was purchased by the plaintiffs, as to 50 tons thereof from Brown & Co. on the 17th of March, 1869, as to 30 tons more from Rayner & Co. on the 26th and 28th of April, as to 25 tons from Vaughan Smith & Co. on the 4th of May, and as to 125 tons, residue thereof, from Stenhouse on the 28th of May. The defendant admitted that the tallow so tendered by the plaintiffs was itself in all respects in accordance with the contracts alleged by the plaintiffs to have been made between them and the defendant as aforesaid.

29. At the trial it was proved that there exists an established custom in the London tallow-trade, for brokers, when they receive an order from a principal for the purchase of tallow to make a contract or contracts in their own names without disclosing their principals, and also to make such contracts either for the specific quantity of tallow so ordered, or to include such order with others they may have received in a contract for the entire quantity, or in any quantities, at their convenience, at the same time exchanging bought and sold notes with the selling brokers, as above described in the present case, and passing to their principals a bought-note for the specific quantity ordered by them, as before described in this case; and that, when a broker so purchases in his own name, he is personally bound by the contract; and that, on the usual settling days, the brokers balance between themselves the purchases and sales so made, and make or receive deliveries to or from their principals, as the case may be, or, if their principals refuse to accept or deliver, then to sell or buy against them, as the case may be, and charge them with the loss, if any, or, if delivery is not required on either side, then any difference which may arise from a rise or fall in the market is paid by the one to the other. This custom does not exist at Liverpool, and was unknown to the defendant. The whole of the transactions and dealings in the present case were carried out in accordance with this custom.

30. A verdict was taken for the plaintiffs by consent for

362*l*. 4*s*. 5*d*., subject to leave reserved to the defendant to move to enter a nonsuit or a verdict, the Court to be at liberty to draw inferences and to amend the pleadings, if necessary, on such terms as the Court should think fit.

31, 32. A rule nisi was accordingly obtained in Hilary Term, 1870, against which cause was shewn in Trinity Term; and the Court, after time taken to consider, on the 14th of July, 1870, discharged the rule, Bovill, C.J., and Montague Smith, J., holding that the defendant was bound by the usage of the London tallow-market, notwithstanding he was ignorant of its existence; and Willes and Keating, JJ., holding that, although a usage of the particular market may control the mode of performing a contract therein, it cannot change its intrinsic character, and that, as the authority given by the defendant to the plaintiffs was to buy for him as brokers, and not to sell to him as principals, the defendant was not bound to accept the tallow. (1)

Various letters which had passed between the plaintiff and defendant were set out in the appendix to the case. The substance of these, so far as they are material, sufficiently appears in the judgment of Cleasby, B., post, p. 96.

1871. Nov. 30, Dec. 1. *Cohen* (*Sir John Karslake, Q.C.*, with him), for the appellant (the defendant below). The plaintiffs, in buying for the defendant, professed to act as "brokers," and charged him with "brokerage." The defendant dealt with them in their capacity of brokers, knowing nothing of the usage of the London tallow-trade, and was entitled to have some one responsible to him as seller other than the plaintiffs, between whom and himself there was privity, and to whom he was to look for the performance of the contract. If it were competent to the plaintiffs to deal as they have done here, the consequence would be that the defendant's remedy upon the contract would be altogether lost in the event of the brokers proving insolvent. A broker is a person employed to exercise his judgment and discretion in dealing for a principal, and one in whom confidence is reposed. He cannot delegate his

(1) Law Rep. 5 C. P. 646.

trust to another. No custom can sanction a course of dealing which altogether ignores his fiduciary character, and directly affecting the legal relation between the principal and the broker: *Hall* v. *Janson* (1); *Salomons* v. *Pender* (2); *Bostock* v. *Jardine* (3); *Sharman* v. *Brandt.* (4) It may be said that one who chooses to deal in a particular market is impliedly bound by all the usages of that market. That, however, is answered by the remark of Willes, J., in the court below (5), "that a custom of trade may control the mode of performance of a contract, but cannot change its intrinsic character." The learned judge goes on to say: "It" i.e. the custom, "may regulate as extrinsic what is done in the market, where the contract does not provide otherwise. It cannot overrule what is agreed upon between the parties, whether intrinsic or extrinsic. The agent may perform the business he is engaged for according to the usages of the market in matters of detail, although the principal be unaware of such usage; because every authority to do a thing, not specifying the way, implies authority to do it in a reasonable way, which the usual way primâ facie is. But no usage unknown to the principal can justify a broker in converting himself into a principal seller."

Watkin Williams (*Sir G. Honyman, Q.C.*, with him), contrà. The plaintiffs having been employed by the defendant to buy tallow for him in the London market, and having bought tallow within the limits prescribed by the defendant's orders, in a manner which is found to be in accordance with the usages of the particular trade, are entitled to be indemnified against loss. The only objection which can be suggested to the course pursued by the plaintiffs is, that there were no separate and specific contracts for the exact quantities of tallow ordered. But it is found that the dealings were in precise accordance with the usage as stated in the 29th paragraph of the case. There is nothing in this that is at all inconsistent with the plaintiffs' character of brokers. It is nothing more than occurs every day where a merchant abroad buys goods of several persons, shipping them to his correspondent in this country,

---

(1) 4 E. & B. 500; 24 L. J. (Q.B.) 97.
(2) 3 H. & C. 639; 34 L. J. (Ex.) 95. 11 Jur NS 432.
(3) 3 H. & C. 700; 34 L. J. (Ex.) 142.
(4) Law Rep. 6 Q. B. 720.
(5) Law Rep. 5 C. P. at p. 656.

(1) S C 1 Jur N S. 571. (3) S C 11 Jur N S 586

1872

MOLLETT v. ROBINSON.

and charging a commission on the price paid. It could not matter to the defendant how or from whom the tallow was obtained, provided he gets delivery of that which he instructed the brokers to purchase. The only real question in the case is, whether one who does not know of the existence of the custom can be bound by it. There are, however, numerous authorities to shew that, where a man employs a broker to deal for him in a particular market, he impliedly gives him authority to deal according to the usage of that market, and is bound to indemnify him against any loss which may accrue to him from such dealing; and ignorance of the custom affords no excuse: *Sutton* v. *Tatham* (1); *Bayliffe* v. *Butterworth.* (2) The point now before the Court was not raised in *Bostock* v. *Jardine.* (3) There is, it is true, a dictum of Pollock, C.B., which has some bearing on it; but no reasons are given. The judgments of Bovill, C.J., and Montague Smith, J., in the court below are clearly in accordance with all the authorities, and must prevail.

Cohen, in reply, referred to the following authorities:—*Bayliffe* v. *Butterworth* (2); *Sutton* v. *Tatham* (1); *Sweeting* v. *Pearce* (4); *Jenkins* v. *Hutchinson* (5); *Schmaltz* v. *Avery* (6); *Humfrey* v. *Dale* (7); *Collen* v. *Wright* (8); *Bostock* v. *Jardine* (3); Blackburn's Contract of Sale, p. 81.

Cur. adv. vult.

Feb. 12. The Court being divided in opinion, the following judgments were delivered:—

CLEASBY, B. In this case the plaintiffs seek to recover upon an alleged liability of the defendant to indemnify them against certain losses which the plaintiffs were compelled to make good, upon two contracts for the purchase of 50 tons of tallow and 200 tons of tallow.

---

(1) 10 Ad. & E. 27.

(2) 1 Ex. 425; 17 L. J. (Ex.) 78.

(3) 3 H. & C. 700; 34 L. J. (Ex.) 142. 11 Jur NS 508

(4) 9 C. B. (N.S.) 534; 30 L. J. (C.P.) 109. 7 Jur NS. 800

(5) 13 Q.B. 744; 18 L. J. (Q.B.) 274.

(6) 16 Q. B. 655; 20 L. J. (Q.B.) 228.

(7) 7 E. & B. 266; E. B. & E. 1004; 36 L. J. (Q.B.) 137; 27 L. J. (Q.B.) 390.

(8) 7 E. & B. 301; 8 E. & B. 647; 26 L. J. (Q.B.) 147; 27 L. J. (Q.B.) 215. 3 Jur NS 363, 4 id. 358.

(7) C 3 Jur NS 213. 5 id. 191.

It was not denied that the defendant became liable to indemnify the plaintiffs against those losses, if the contracts were entered into for the defendant and according to his instructions: but the defendant alleges that no contract was entered into on his behalf so as to make him liable.

The plaintiffs were tallow-brokers in the City of London, and the defendant was a merchant at Liverpool. It will be sufficient, in what follows, to treat the case as if there was only one contract, for 50 tons, as there is no distinction between them.

On the 2nd of April, 1869, the defendant instructed the plaintiffs to purchase for him 50 tons of tallow. There is no doubt that the plaintiffs were employed to make this contract as brokers. This appears from all the correspondence, as well as from brokerage being charged. It must also be taken that the contract was to be made on the London tallow-market, so as to be subject to the regulations or usages of that market relating to such a contract. The plaintiffs, upon receiving the instructions of the defendant, made a contract with certain brokers, Simpson & Co., for the purchase of 150 tons of tallow, intending, as stated in par. 12 of the case, to appropriate 50 of the 150 to the defendant's order, and the remaining 100 to another order.

It was customary on the tallow-market for brokers acting for several buyers at the same price to make one contract for the amount of all the purchases. The plaintiffs forwarded to the defendant a regular bought-note of the 50 tons, and to Simpson & Co. a sold-note for the 150 tons. The defendant refused to accept the 50 tons at the time for delivery, and the plaintiffs were obliged to pay Simpson & Co. the difference of price.

The alleged custom of the tallow-trade as to the performance of the contract will be considered hereafter, and also its bearing upon the effect of the contract made by the brokers. But a question was argued before us, whether the manner in which the plaintiffs had made the contract with Simpson & Co. (joining in it the defendant's order with that of another person) was not such a departure from their duty as brokers, and so much at variance with the defendant's instructions, as to make the contract in no sense the defendant's contract, and so the defendant not responsible. In the absence of any usage, this would be so. The duty of the broker in general is clear. He is to make a contract for the principal with another person; and there is no such contract, unless there is some other person who has entered into the same contract. But in the present case it is said the contract is made in the manner customary on the tallow-market.

Now, it is not disputed that, if a person authorizes another to bargain for him on a particular market, he authorizes him to contract in the manner usual there, provided the usage is not of such a nature as to alter the employment. A person who holds himself out to act as a broker, and charges a brokerage, cannot set up, as against a person unconnected with the market, and ignorant of its usages, a usage that he should fill a different character from that of broker: but, as to the form and mode of making the contract, and as to the mode of performing the contract when made, the authorities shew that the usage is binding. In the present case, the question is, whether the contract made with Simpson & Co. for 150 tons can, taking the usage into account, operate as a contract made on behalf of the defendant, who had only ordered 50 tons to be bought. It rather appears to me that the objection is more to the form and mode of contracting than to the substance.

If the plaintiffs, as soon as the contract with Simpson & Co. was made, had (as it is said they intended to do) really appropriated 50 tons of it to the defendant, and that contract had continued in force until the time for performance, the defendant would have been entitled to the benefit of that appropriation, and would have been entitled (supposing the usage did not make it a distributable contract among the purchasers, so as to entitle each to sue in his own name,) to sue in the name of the plaintiffs, and recover damages. There is an apparent difficulty in doing so, because the other persons to whom the residue of the 150 tons was appropriated would also be entitled to sue. But I think the difficulty is not a real one, because the usage is known to and binds Simpson & Co., and, although they only make one contract with the plaintiffs, they know that the plaintiffs may be contracting for several principals, and assent to that being done. And it would follow

1872

MOLLETT v. ROBINSON.

that the principals would be entitled to all the benefits of the contract, and therefore entitled to put it in suit by a special declaration shewing the usage, and who each plaintiff was, and how he was entitled to sue upon the contract. The case put is quite a hypothetical one, because the usage does not stop where I have stopped; but, if it did, and each contract of sale remained in force until the time of performance for the benefit of each buyer, I should be disposed to say the buyer could not get rid of the consequence of the contract because other buyers had been included in the same contract.

But, though I should hesitate in coming to the conclusion that, because the contract with Simpson & Co. was made in the form and manner stated, there was no contract between Simpson & Co. and the defendant, yet it appears to me that, when the whole usage is examined, by virtue of which there is said to be such a contract, it will appear that there really never was any contract at all by which the defendant and Simpson & Co. were intended to be mutually bound, and that the alleged contract with Simpson & Co. is a mere form by which the plaintiffs, though apparently acting as brokers, are enabled to be the real sellers.

It is said in par. 12 of the case, that, at the time when the contract for 150 tons with Simpson & Co. was entered into, the plaintiffs intended to appropriate 50 tons to the defendant's contract. But this expression of intention, if it has any meaning, cannot signify a real appropriation; because the transaction was governed by the usage stated in par. 29; and this (which was acted upon afterwards) shews that the purchase from Simpson & Co. was not intended to be appropriated to this any more than to any other contract. It was only to form an item in a tallow account between Simpson & Co. and the plaintiffs. If, before the time when this contract was made, the plaintiffs had contracted to sell Simpson & Co. 150 tons, according to the usage the two contracts would have balanced each other, and neither could have called for any delivery. And so if, after the contract for the 150 tons was made, the price had immediately risen, and the plaintiffs had afterwards made another contract to sell Simpson & Co. 150 tons at an advance of 3*d.* a cwt., the pretended sale by Simpson & Co. to the plaintiffs would have been in effect cancelled; and all that

7 HL 815

would have resulted from it would have been the plaintiffs' brokerage and the profit of 3*d.* a cwt.; and, when the time for delivery came, the plaintiffs would have had to find the 50 tons to deliver to the defendant.

In reality, the custom stated in par. 29 shews conclusively that it was never intended that the contract with Simpson & Co. should be performed by them for the benefit of the defendant, and it cannot therefore in any reasonable sense be considered a contract entered into for his benefit.

In the present case it appears from par. 28 that the plaintiffs were themselves purchasing tallow towards the end of May, for the purpose of performing the contracts made with the defendant: and the result of the custom and course of dealing is this, that, when the time for delivery arrives, the interests of the broker and the principal are directly opposed,—the interest of the principal is that he should be able to sell at as high a price as possible; the interest of the broker, that he should be able to buy at as low a price as possible. In short, the proper character of broker is entirely lost, as it appears to me, in such a transaction. And, when I say that the character of broker is lost in such a transaction, I feel justified in adding that it is lost by the application of a custom which has grown up in disregard, perhaps not thought of or intended, but still in utter disregard of the supreme obligations of good faith.

The correspondence shews throughout that the plaintiffs were dealt with as persons filling an independent position, and qualified to be consulted and to advise. For example, in the letter of the 4th of May, 1869 (B. in the Appendix), written, shortly after the contract was made, by the defendant to the plaintiffs, he refers to the state and prospects of the market, and concludes with the question, "What are your views?" The plaintiffs, in their answer of the 5th of May (C. in the Appendix), explain their views. They begin by regretting the fall of the market, for his sake, and say they cannot see their way into the future. They then go into the state and prospects of the market, and end by indirectly recommending the defendant to make further purchases. Can a custom prevail which is to uphold the plaintiffs, not as independent middlemen, but as the interested vendors, and with interests, it may be the same, but it may be directly opposed to those of the defendant?

A disposition to uphold the contract actually made may have made me go too far in the opinion that, if the contract made with Simpson & Co. had been in fact really and irrevocably appropriated to the defendant, the customary mode of lumping purchases together in one contract would still have left the defendant the power of resorting indirectly to Simpson & Co. for the fulfilment of their part of the contract. As to this, which may be regarded as the form of the transaction, I can well understand there may be a difference of opinion; and my own is given with much hesitation. But, as regards the substance of the transaction, I feel strongly, having regard to the position which the plaintiffs occupied in relation to the defendant, as appears both from the correspondence and the nature of the employment, that the contract by which the plaintiffs pretended to be brokers for commission and intended to be themselves vendors, and which beyond a doubt would not be binding, in the absence of a custom,—see *Bostock* v. *Jardine* (1), *Salomons* v. *Pender* (2),—is not made binding by the force of such a custom as I have examined and described.

The result is, that, in my opinion, the rule to enter a verdict for the defendant ought to be made absolute.

HANNEN, J. It is an undisputed fact in this case that the plaintiffs were employed by the defendant in the character of brokers to purchase tallow for him. It is not denied that the employment of a broker is an employment as an agent only to buy or sell for his principal of or to another principal, and that it is the duty of the broker to negotiate a valid contract between the two principals. The definition of a broker given by my Brother Blackburn in his work on the Contract of Sale, p. 81, is as follows:—"A broker for sale is a person making it a trade to find purchasers for those who wish to sell, and vendors for those who wish to buy, and to negotiate and superintend the making of the bargain between them." This is the proper description of a broker for sale throughout the whole commercial world.

7 HL 774

It is a further undisputed fact in this case that the plaintiffs,

---

(1) 3 H. & C. 700; 34 L. J. (Ex.) 142.
11 Jur NS 586.

(2) 3 H. & C. 639; 34 L. J. (Ex.) 95.
11 Jur NS 432.

1872
MOLLETT
v.
ROBINSON.

though they sent to the defendant a bought-note in the usual form, representing that they had bought tallow for his account. and charged him brokerage, had not in fact negotiated any contract between him and any other principal, but had themselves in effect bought of other parties and re-sold to the defendant.

It is conceded that, under ordinary circumstances, the plaintiffs could found no claim against the defendant upon this state of facts; but it is contended that the plaintiffs are here entitled to do so, on the ground that, by the custom of the tallow-trade in London, brokers are authorized, in carrying out their employment as agents for their principals, to omit to negotiate any contract between their employer and another principal, and to put themselves in the position of sellers to their principal.

It is found that the defendant was ignorant of the existence of such a custom. Of course, if he had known of the practice, he must be taken to have employed the plaintiffs to act in conformity with it; but, if such a practice be binding on a person ignorant of it, it appears to me to amount to a custom for a broker in the tallow-trade in London to do something entirely inconsistent with the character of a broker, viz. to convert himself from an agent to buy for his employer into a principal to sell to him. This seems to me a violation of very obvious principles; and its true character is only obscured by the accident that the defendant did not in this instance suffer by the plaintiffs' carrying out their employment in the way they did. But an agent is not entitled to depart from his instructions, on the ground that the result has proved equally advantageous to his principal. If this custom is to be upheld, it will be equally binding on a person who may find himself without any other principal to look to, and with only an insolvent broker to be responsible to him.

7 HL 815.

It is not difficult to conjecture how the vicious practice sought to be justified as a custom has grown up. If a broker is at liberty to buy in large quantities and sell to his principals in small, this doubtless facilitates the earning of his brokerage; and so, the more readily to do this, and to save himself the trouble of negotiating separate contracts, he sacrifices the interest of his principal, which is, to have the security, not merely of the broker, but of another principal.

The case to which this has been likened of a merchant abroad buying of several persons and shipping to his correspondent in this country, charging a fixed commission on the price paid, is not parallel. That is not the business of a broker, but a business of a totally different character, well known as that of a commission merchant. The business of such a merchant is not to negotiate a contract between his correspondent and third persons, and therefore differs from the employment of a broker in the essential point on which, as it seems to me, the determination of this case depends.

For these reasons, I think that the judgment of the Court below should be reversed.

MELLOR, J. (1) I propose to confine my observations on this case to one transaction only, as it raises the question upon which our decision must turn.

7 HL 815

The defendant, who is a merchant at Liverpool, on the 2nd of April, 1869, instructed the plaintiffs, who are "sworn brokers" carrying on business in London, to buy for him 50 tons of tallow, June delivery, at 46*s.* 6*d.* The plaintiffs, on the same day, by letter informed the defendant that they had succeeded in buying for "his account" 50 tons of tallow, and inclosed in such letter a formal bought-note beginning as follows: "We have this day bought for your account 50 tons nett in casks," &c., and signed "Mollett, Bull, & Unsworth, sworn brokers."

The plaintiffs, who had other orders from other customers, bought several lots of tallow in their own names, with the intention to distribute and appropriate them to their various customers in proportion to their several orders; but there was no sold-note between the plaintiffs and their sellers corresponding to the bought-note sent to the defendant, and no such purchase as therein represented was in fact made by the plaintiffs for the defendant. The 50 tons were not delivered, nor did the sellers deliver any tallow to the plaintiffs; but the practice was, to write it off in a general account between the plaintiffs and their sellers, upon which a balance was struck, and the plaintiffs paid, or allowed, or set off any difference occasioned by the state of the market.

(1) Read by Hannen, J.

It was admitted, on the argument before us, that the effect of this mode of dealing by the broker was to deprive the defendant of all recourse against the seller in case of non-delivery of the tallow, and throw him entirely upon the responsibility of the broker; and it was further admitted that, unless the custom said to exist in the tallow-trade in the London market authorized the plaintiffs to make the contract which they actually made for the defendant, he was not bound by it.

It is clear that the defendant employed the plaintiffs in the character of brokers only; and it was incompetent for them, as it appears to me, to enter into any contract for the defendant the effect of which was to convert themselves into sellers, and thus to deprive the defendant of the responsibility of a principal. The plaintiffs professed to act as brokers only, and in that character charged the defendant with a commission for so acting. A merchant may well trust to the skill and integrity of a broker to make a contract for him with a solvent principal, whilst he may be indisposed to trust to his, the broker's, own solvency.

It was, however, contended that the *universal practice* in the London tallow-trade must be taken as incorporated into the authority given by the defendant to the plaintiffs as such brokers. The statement of such custom or practice is to be found in the 29th paragraph of the case; and, if it is to be taken as incorporated into the authority given by the defendant to the plaintiffs, it no doubt authorized them to purchase any quantity of tallow in their own names, making themselves thereby responsible to the sellers, and to appropriate to each of their customers the quantity of tallow necessary to satisfy his individual order.

I quite agree that the custom or practice of a market, thoroughly established, must bind a person who authorizes a broker to make a contract for him, although the custom is in fact unknown to him, so far as it regulates merely what is done in the market, and applies to the mode of the performance of the business for which the broker is engaged. But I think that no usage or custom of a market, unknown to the principal, can enable the broker to change his essential character, and become himself the real seller, and deprive his principal of the responsibility of a seller. I have already observed that the principal may have confidence in the skill and experience of his broker, and yet have none in his solvency.

In the present case, there was no ratification of the broker's authority, and therefore, unless the custom can be read into the original authority, there was no contract binding upon the defendant.

It is said that it cannot matter to the defendant how or from whom the tallow is procured, provided he obtains the delivery of that which he instructed the broker to purchase. That might be so, if in fact the broker was able to insure the delivery of the tallow pursuant to the contract. But the defendant, as it appears to me, was not bound to accept the broker's sole responsibility for such delivery. Had the brokers written to the defendant and informed him of the custom or practice of the trade in London, it is probable that the defendant would not have objected to have his order placed according to such custom, notwithstanding that it did not give him the responsibility of a seller. But the brokers did not do that, and in fact represented that they had bought on the defendant's account the 50 tons of tallow in question. I think that the true limit of the effect of a practice or custom of a market with respect to such transactions, is that stated by my Brother Willes, in delivering the judgment of himself and Keating, J., in the court below; and I fully concur in that judgment.

I ought to say that the case of *Bostock* v. *Jardine* (1), which was cited by my Brother Willes, and in a measure relied upon as an authority in point, is mis-reported in 3 Hurlstone & Coltman's reports, but appears to be more accurately reported in the 34th volume of the Law Journal. It was tried before me at Liverpool; and I have referred to my notes, and I find that no question was put to the jury, but that I directed a verdict for the plaintiff, giving to the defendants leave to move to enter a verdict for the defendants, or a nonsuit; upon which it appears that the Court of Exchequer granted a rule, which was afterwards discharged; and the case is only an authority for that which was conceded in the argument, viz. that, without the aid of the custom, no contract binding the defendant was made in the present case.

---

(1) 3 H. & C. 700; 34 L. J. (Ex.) 142. 11 Jan ad 1886

1872

Mollett
v.
Robinson.

I am of opinion that the rule to enter the verdict for the defendant should be made absolute.

Blackburn, J. This was an appeal from the judgment of the Court of Common Pleas, which was argued in the sittings after last Trinity Term, before the Lord Chief Baron and my Brothers Channell, Mellor, Hannen, Cleasby, and myself.

At the trial the verdict was entered for the plaintiffs, subject to leave to move on grounds which we must take to be accurately set forth in the case before us. A rule was granted in the Common Pleas, on the argument of which it appeared that Bovill, C.J., and Montague Smith, J., were of opinion that the rule should be discharged, and Willes, J., and Keating, J., were of opinion that the rule should be made absolute. The Court below being thus equally divided in opinion, no judgment was pronounced, but the rule was discharged and the verdict stood; and now the question is brought before this Court on appeal. The opinions of the judges below are reported in Law Rep. 5 C. P. 646.

After a good deal of consideration, I have come to the conclusion that the verdict found for the plaintiffs is right, and should not be disturbed.

CPD657.

The great question in this case is, whether the orders given by the defendant to the plaintiffs to buy tallow for him are to be understood as incorporating the customary terms, and so as to give the plaintiffs authority to act in the manner which the jury have found to be the established custom of brokers in the London tallow-trade. We in the Court of appeal must act on this finding as true, and treat those as being really the customary terms. If the orders are to be understood as incorporating these customary terms, the plaintiffs have pursued their authority: And there is no difficulty as to the pleadings; for, I apprehend that, where a person acting at the request of and in pursuance of an authority given by another has incurred a liability, and has in consequence been before action obliged to pay money in discharge of that liability, he is entitled to have that money repaid to him; and the count for money paid is a proper count under which to recover it: *Brittain* v. *Lloyd*. (1)

7HL823

---

(1) 14 M. & W. 762.

The orders are set out in the 8th and 9th paragraphs of the case. They are not requests to the plaintiffs to sell tallow to the defendant, but are expressed to be orders to the plaintiffs to buy tallow for the defendant; and a discretion is given to the plaintiffs to fix the price, which would be quite inconsistent with the plaintiffs being themselves the vendors. Those orders were given to the plaintiffs in their character of brokers; and they expressly call themselves brokers when acting in pursuance of their orders; and they charge commission as brokers. I do not attach so much weight to the use of the word "broker;" but I think that the discretion as to the price and the charge of commission are conclusive to shew that the orders were given to the plaintiffs intending them to act, not as principals, but as agents for the defendant, and middlemen and negotiators, which is the thing which is meant by the word broker. Primâ facie, the legal effect of accepting such orders is, that the plaintiffs were employed by the defendant on the terms that they should perform all the ordinary duties of brokers, and have all the ordinary authority of a broker. But this is only primâ facie. The terms on which the parties deal may be varied so as to impose on the brokers duties and liabilities, and give them powers beyond those which would be implied by law from the employment; or so as to relieve them from some of the duties which would be otherwise imposed on them. And this may be either by express agreement between the parties or by the force of a custom of a particular trade tacitly incorporated as part of their agreement: for, if it is perfectly well known that those engaged in a particular trade are always understood to deal on certain terms; the employment, unless there is something to shew the contrary, is to be taken to be by the agreement of the parties on the customary terms, though they were not expressed. This is in conformity with the maxim, "In contractibus tacitè insunt ea quæ sunt moris et consuetudinis." Pothier, in his Traitè des Obligations, partie 1, sect. 1, art. 7, § 95 (tom. 1, p. 52, Dupin's edition, 1827), expresses this same rule thus,—"On sousentend dans un contrat les clauses qui y sont d'usage quoiqu'elles ne soient pas exprimées." And this tacit variation of the terms from those which would otherwise be implied by law, has the same effect as if it was express. The great question in the present case is,

1872

MOLLETT v. ROBINSON.

whether there is enough to shew that the customary terms are not to be tacitly incorporated.

In the judgment of my Brothers Willes and Keating below, it is said to be "an elementary proposition that a custom of trade may control the mode of performance of a contract, but *cannot change its intrinsic character*." To some extent I agree with this. If the terms are such as to be inconsistent with the nature of the employment, so that, if they prevailed, they would change its nature altogether, I think they should be rejected. In such a case, if the employment and the terms were expressed at full length beside each other, there would be an apparent contradiction and incongruity: as, for instance, if an order was given thus,—"Act for me as my agent to buy for me, and receive commission from me for your services as such agent, on the terms that you are neither to have the powers nor perform the services nor be subject to the liabilities of an agent, but shall be subject to the liabilities and have the rights of a vendor," there would be a patent contradiction on the face of the order. If this was all expressed, it would be a question of construction whether the order was to be considered void for uncertainty, or whether the expressed terms were to prevail though the effect would be that the relation between the parties would not be that of principal and agent at all.

The duty of the Court is to construe ut res magis valeat, and therefore generally in the construction the expressed terms would prevail, though that would have the effect of making the real relation different from the nominal one. But, if those terms could only be brought in, because, being the customary terms, they were to be tacitly understood, I think it would be different. The maxim "Expressum facit cessare tacitum" would then apply; and, if the order expressed that the employment was to be that of an agent, and the customary terms, if incorporated, would make it not that of an agent at all, the expressed employment would prevail over the tacit terms, and cause them to be rejected as inconsistent with and repugnant to the express employment.

To make my meaning plainer, I will put a case of a trade such as that of a jobber, who sells to any one who comes to him at a fraction above the market price, and buys of any one at a fraction below the market price. If such a person received an order expressed as if he were for commission to act as an agent to buy for his correspondent, he ought, unless he were willing to act as an agent, to reject it, informing his correspondent of his mistake, and that he was not an agent, but a jobber; for, I think that, if he accepted the order thus expressed, he would incur the liabilities of an agent, however well known it might be that he was a jobber, and that jobbers did not incur such liabilities: and I think this would be so even though the fraction which as a jobber he would receive were in amount the same as the commission which as agent he would receive.

If this is all that is meant by the passage I have cited from my Brother Willes's judgment, I agree with it, though I differ as to its application to the present case.

I have already expressed my opinion that the orders clearly express an intention that the plaintiffs should buy for the defendant, acting as his agents, and receiving pay for their services as such; and, if I thought that the effect of tacitly incorporating in the orders the custom set out in par. 29 of the case would be to change the relation between the parties from that of principal and agent to that of buyer and seller, so as to deprive the defendant of the services of the plaintiffs, for which he pays commission; and more particularly, if I thought the effect of the custom was to put the duty which the plaintiffs would owe to the defendant to obtain for him as good a bargain as was practicable, in conflict with their interest; I should, as at present advised, think that the customary terms must be rejected, as excluded by the terms of the employment.

I have thought it right to say so, though it is not necessary, in the view I take of the case, to decide this; for, I come to the conclusion that the custom is perfectly consistent with the employment of the plaintiffs as brokers to buy for the defendant, and leaves the plaintiffs under liabilities to the defendant for the due performance of services, quite sufficient to be a consideration for the commission, though the effect of the custom is materially to vary both the duty and the authority of the plaintiffs from that which would be implied by law if no such custom were incorporated.

In this I take a different view of the facts from that which seems to have been taken by my Brothers Willes and Keating in the court below. It is, therefore, necessary to examine what the facts of the case are.

The order of the 2nd of April was, to buy for the defendant 50 tons for the June delivery. On that day, it appears in the 8th paragraph, the plaintiffs sent the defendant a formal bought-note for 50 tons, setting out all the terms of the contract, and signed by the plaintiffs as brokers. In par. 12 it is stated that, on receiving the defendant's order of the 2nd of April, the plaintiffs entered into a contract with W. W. Simpson & Co. for the purchase of 150 tons of tallow, intending to appropriate 50 out of these 150 tons to the defendant's order, and 100 to another order which the plaintiffs had received from another person: and the plaintiffs sent a sold-note to Simpson & Co. for 150 tons of tallow, in all respects corresponding with the note sent to the defendant, except in the quantity. It is this variance in the quantity that raises the first difficulty; and I agree that, but for the custom, it would be fatal. But what at present I wish to point out is, that there was no breach of the fiduciary relation between the parties, nor anything inconsistent with the employment which the plaintiffs had accepted, to buy for the defendant as cheap as they could, and the duty which I think is in consequence thrown upon those who accept such an employment, not to set their interest in conflict with their duty, as they would do if they were to make themselves the principals who would profit if the price were higher. Had the plaintiffs obtained the consent of Simpson & Co. to divide the contract, and delivered to them two sold-notes, one for 50 tons and the other for 100 tons, the transaction would have been all regular and binding, without the aid of any custom at all. The plaintiffs had not in the least degree more interest in the transaction because the contract was not divided; they would have been liable for the fulfilment of the contract as brokers who did not disclose the name of their principal, as much in the one case as in the other; and in neither case was their personal interest put in conflict with their duty to their employers.

The manner in which the order of the 28th of April was acted upon is stated in paragraphs 9 and 13. It differs in this, that there were two sold-notes for *smaller* quantities than the one bought-note; but in other respects it was similar. In this case also there was no breach of the duty imposed by the fiduciary relation between the parties. I am the more anxious to point out this, because, as I have already intimated, I should, as at present advised, give judgment for the defendant, if I did not think that this was the fact. But, though there was not any breach of this fiduciary relation, there was an important departure from the ordinary duty of a broker.

The ordinary duty of a broker is, to make a contract between his employer and some other person: and, though the broker may, in consideration of a del credere commission,—see *Coutourier* v. *Hastie* (1),—or, according to the custom of particular trades, in consideration of his not being called upon to disclose the name of his principal,—see *Cropper* v. *Cook* (2); *Fleet* v. *Murton* (3),—incur personal liability to see that the contract is performed; yet the employer has a right to have the liability of the other person as well; and this is an important matter.

In the present case, Simpson & Co. have failed, whilst the brokers (the plaintiffs) have remained solvent, and so the liability of the contractor is not of consequence; but it might very well have been that Simpson & Co. had remained solvent and the brokers failed. Then the importance of having a contractor bound to the defendant would have been obvious, as is well pointed out by Willes, J. (4); and this is an important difference. The person who employs a broker on the terms that the broker is to make a contract for him with another, relies on the skill and intelligence of the broker who is to select his contractor, and who will choose a solvent one; but he has no occasion to inquire whether the broker has enough capital to meet the contract. Even where the name of the contractor is not disclosed, and the broker is personally liable, it is a great security to have in addition the liability of a contractor who, though not named, is, if the broker has done his duty, a person of repute, such as a broker might reasonably trust.

Now, in the present case, there is no contract between the de-

---

(1) 8 Ex. 40; 22 L. J. (Ex.) 97.

(2) Law Rep. 3 C. P. 194.

(3) Law Rep. 7 Q. B. 126.

(4) Law Rep. ~~6~~ C. P. at p. 656. 5

1872

MOLLETT
v.
ROBINSON.

fendant and Simpson & Co. The defendant could not call upon Simpson & Co. to deliver him 50 tons of tallow under the contract of the 2nd of April, because Simpson & Co. had not engaged to deliver any smaller quantity than 150 tons. Nor could Simpson & Co., if willing to deliver the smaller quantity of 50 tons, compel the defendant to accept them, because, if they had been unwilling sellers, the defendant could not have forced them to deliver him that smaller quantity: see *Thornton* v. *Charles* (1); and I cannot think that the difficulty is cured by any equity entitling the now defendant to use the plaintiffs' name and sue upon the contract pro tanto for himself. All this difficulty would have been avoided, if two sold-notes, one for 50 tons and one for 100 tons, had been delivered to Simpson & Co., instead of one for 150 tons. But the custom, it is expressly found, is, to dispense with doing so; and the case of *Thornton* v. *Charles* (1) leads me to infer that the practice is not of recent date.

I can understand that the dividing of a lot may necessitate some negotiation and trouble, so as sometimes to cause a bargain to be lost which would be made if the whole lot were taken at once. Possibly even the objection to dividing a lot may be one only to be overcome by a fraction of rise in the price; and therefore I can easily imagine reasons why the broker engaged in such a business should desire to have every facility for purchasing entire lots, though the quantity may not precisely correspond with that specified in the order of any of his constituents. And I can also understand why the constituent should be willing to give every facility for uniting his order with those of others, or splitting his order into different parts, if thereby it can be executed more promptly or on more favourable terms. I am not, therefore, at all surprised at a custom having sprung up, with the object of enabling the broker to make his contracts more promptly and more cheaply than he could do, if obliged to make his contracts for the precise quantity in his orders. I should have thought beforehand that those objects might have been carried out without losing the advantages derived from the personal responsibility of the principals to each other. For instance, I should have thought that the plain-

(1) 9 M. & W. 802.

tiffs might have delivered to Simpson & Co. on the 2nd of April two sold-notes, one for 50 tons and the other for 100 tons, instead of one note for 150 tons, and on the 28th of April have delivered to the defendant two bought-notes, one for 150 tons and one for 50 tons, instead of one for 200 tons; and to Messrs. Rayner two sold-notes, one for 50 tons and one for 150 tons, instead of one for 200 tons, without any objection on their parts, and with a very little additional trouble.

But no one not personally conversant with a business can tell what little things are found in practice to be important. The custom, which was proved to the satisfaction of a London jury and of the judge who tried the case, is stated in par. 29 of the case; and by that it appears that in this trade it is an established custom for the brokers who have received an order from a principal for the purchase of tallow "to include such order with others they have received in a contract for the entire quantity, or in any quantities at their convenience, at the same time exchanging bought and sold notes with the brokers, as above described in the present case, and passing to their principals a bought-note for the specific quantity ordered by them." And I cannot construe this as having any other meaning than that the custom is, not to require the broker to take care that privity of contract is established between the broker's client and the person who makes the contract with the broker into which he enters in consequence of his client's order. I am not able to see any inconsistency between this modification of the broker's duty and his employment as a broker. The employment would be on the terms that the broker, in consideration of his employment for commission, should use reasonable skill and diligence to purchase the goods as cheaply as he could, not exceeding his client's limits, and to charge the client only the customary commission in addition to the price actually agreed on, and (as a necessary result of those duties) that the broker should not himself have any interest in selling the goods, so as to put his duty to obtain the goods cheap in conflict with his personal interest; and, further, by the custom, that, if he did not disclose the name of the person with whom he made the contract, he should be himself personally liable for its fulfilment, just as a del credere broker would be. In the ordinary case of the employment of a broker, there would be this further duty, that he should use reasonable skill and care to establish a binding contract between his client and the other contractor. The custom leaves all the earlier terms untouched, but varies the last.

I own I do not see how this variation is inconsistent with the employment of the plaintiffs as brokers, or how it can, to adopt the language of Willes, J., be said in any way to change the intrinsic character of that employment. Let us suppose, to test it, that the whole were written out, and that the constituent of the broker wrote as follows,—"Act for me as my broker in buying the tallow on as good terms as practicable, and for that purpose you may establish privity of contract between me and the person who engages to supply it, as ordinary brokers do: But, as I am told that it is found by experience that a broker can more speedily and perhaps more cheaply pick up tallow when able to take an entire lot from another broker than when obliged to make a contract for the specific quantity contained in the client's order, and, as, it would seem, it is found in practice inconvenient to effectuate a contract for an entire lot by the delivery of several sold-notes, containing each the quantity bought for each different client, and amounting in the aggregate to the quantity contained in the lot, without which no privity of contract can be established, and in consequence it appears that my order may be placed more quickly, and perhaps more cheaply, if I will dispense with the necessity for establishing privity of contract between me and the other contractor; for these reasons, I give you an alternative authority to dispense with establishing privity of contract between me and the other contractor, provided you are personally liable to me for the fulfilment of the contract, and there really is a contract made by you which you can enforce, entered into in consequence of my order, and so fixing the price, and preventing your interest from coming in conflict with your duty to me; in every other respect, you are to have the authority and liability of a broker." Such a variation of the terms would be in no way inconsistent with the relation between the parties being that of broker and client. The custom stated in the 29th paragraph, as I read it, does no more than add as one of the terms of the broker's employment an alternative power to the effect I have just stated. It

7 HL 825

seems to me in no way inconsistent with the employment as broker, and therefore not objectionable on that ground.

The case of *Bostock* v. *Jardine* (1) was referred to in the Court below and in the argument before us as a decision that such a custom was bad in law; and, as reported, it certainly seems so; for, it is there stated that the question was left to the jury, who found that there was such a custom, and yet the Court entered judgment for the defendant: but the case is misreported in this respect. My Brother Mellor, before whom the cause was tried, has referred to his notes, and finds that no question was left to the jury, the case being treated as one of law for the Court only.

The defendant is stated to be a Liverpool merchant, and personally ignorant of this custom. But I think it is now thoroughly established that a person who deals in a general market is bound to inquire what its usages are; and that those who deal with him have a right to hold him bound by them to the same extent as they would have been entitled to hold a person bound who belonged to the place. He is precluded from setting up, as against the persons he dealt with, his ignorance of that which he ought to have known. I refrain from discussing this at length, because I do not understand that any of the judges either in the court below or above doubt that the defendant is in no better position because he was a Liverpool man, who chose to deal in London, than if he had been a Londoner.

These are the reasons which lead me to the conclusion that, when the plaintiffs on the 2nd of April entered into a contract with Simpson & Co. for 150 tons, making themselves liable to take and pay for them, they did, as far as regarded 50 tons, incur that liability at the request of and in pursuance of the authority given by the defendant in his order of that date, which is one part of the plaintiffs' case. It remains to be seen whether, in consequence of that liability, the plaintiffs have been compelled to pay money, and whether all conditions precedent to the defendant's obligation to pay that money have been fulfilled. I think both positions are made out.

I quite agree that the plaintiffs cannot call upon the defendant to pay them, unless they can shew that he might have had the

(1) 3 H. & C. 700; 34 L. J. (Ex.) 142. 11 Jur N.S. 586

1872

MOLLETT
v.
ROBINSON.

tallow he had stipulated for, on payment of the price. It was argued at the bar that this was not so, because the specific casks of tallow which were offered to the defendant were never the property of Simpson & Co.; and this, no doubt, is true in fact. But I am not able to see anything which entitled the defendants to insist on having tallow that had belonged to the persons whom the plaintiffs described in the bought-note as principals from whom they bought. Supposing that there had been a sold-note for 50 tons delivered to Simpson & Co., so as to establish privity of contract between that firm and the defendant, I apprehend that Simpson & Co., if that firm continued solvent, or its trustees if it failed, might have supplied the defendant when the right time came with any tallow answering the description in the contract, however or wherever obtained; and that the defendant could not have refused to receive that tallow, provided it did answer that description.

I have known cases in which the party who had contracted to supply goods had failed before the time of delivery, and could not himself on his own credit have procured such goods, but, the market having gone down, so that the bargain was a good one, he or his creditors have gone into the market and agreed with a third party to supply the goods on his behalf, receiving the contract price, and out of that retaining the price at which the third party was willing to furnish the goods, handing to the contractor~~s~~ or his creditors the surplus. I have always, when at the bar, considered that such a course was legitimate. I think that since I have been on the bench I have so ruled, though of that I cannot be sure; and I never heard that either a judge or a jury took an opposite view of such a transaction. The defendant, if the goods are of the description stipulated for, gets all he bargained for: and, why should he be entitled to make a dishonest profit on account of the failure of the contractor? And (still assuming, contrary to the fact in the present case, that there was privity of contract), if the person who was to supply the goods to the broker's constituent A. had chanced to have made a contract through the same broker to receive similar goods at a lower price from a constituent B., I can conceive no reason why he should not say to the broker, "Apply the goods which your constituent B.

is to supply to me at so much a ton to the fulfilment of the contract by which I am bound to supply to your constituent A. at so much more a ton, and apply the money you pay on behalf of A. in the first instance in paying B., and hand over to me only the surplus." This is called in the case setting off one contract against another, and it was treated on the argument as something abnormal, and which it would require a custom to justify. But it struck me on the argument that it would be quite fair and proper, and required no custom at all to justify it. I asked what harm it would do to A. if his contract was fulfilled by means of this which is called a set-off; how he was prejudiced by receiving all that he had bargained for by means of this or any other machinery that was convenient to the other side. No answer was given; and, after turning it over in my mind, I can see none that could have been given.

If, indeed, there should be any dispute as to the quality of the tallow offered, the broker who was acting in the case supposed for both A., who is to receive the tallow, and whose interest is to have it extra good, and B., who is to supply it, and whose interest is therefore to pass tallow that was of as low a quality as would comply with the contract, could not well act as arbiter or judge as to the quality of the tallow; but this is a small matter, and no difficulty of that sort has arisen here.

It seems to me that the effect of the transaction which is called balancing and settling the contracts against each other was simply this, that Simpson & Co. or their trustees said to the plaintiffs, "Apply all the tallow which you are bound to supply to us, as far as it will go, to the fulfilment of those contracts by which we are bound to supply you tallow on the same terms; as to the balance of the contracts, get tallow where you can to fulfil them, on the best terms you can; charge us with the market-price, and pay us the difference between that and the contract-price." The plaintiffs assented to this. It is stated in the case that it is the custom so to do, which certainly tends to shew that it is convenient; and perhaps, therefore, the plaintiffs were bound to do so. But I have failed to see what objection there would have been to their voluntarily adopting this course, without custom at all, even if there had been complete privity of contract established between the defendant and Simpson & Co.; nor can I see how the defendant is in any way prejudiced by this course being followed. If the plaintiffs had by any means escaped paying the difference to Simpson & Co., and were seeking to make a profit out of the transaction, it would in my opinion have been quite a different case.

I have had the advantage of reading my Brother Cleasby's opinion; and I wish to point out where are the two matters in which I differ from what I understand to be his reasoning.

In the first place, I understand the statement in par. 12 of the case, that, "on receiving the defendant's order of the 2nd of April, the plaintiffs entered into a contract with Simpson & Co. for the purchase of 150 tons of tallow, intending to appropriate 50 tons out of these 150 tons to the defendant's said order," as amounting to a finding that the plaintiffs made this contract with Simpson & Co. in consequence of the defendant's order, and in intended pursuance of his authority and (if the custom is effectual) in real pursuance of his authority. I quite agree that it had not and was not intended to have the effect of establishing privity of contract between the defendant and Simpson & Co. And the same remarks apply to the second order. Secondly, that the contracts actually entered into were not for the sale of specific casks of tallow, or for the supply of tallow from a particular stock, or supplied by a particular firm whose brand might be of importance; but are contracts to supply any tallow answering a particular description; and consequently the defendant was offered all that he had ever stipulated for, and suffered no prejudice from the tallow being obtained elsewhere than from Simpson & Co.'s own stores.

For these reasons, I think the judgment of the Court below should be affirmed.

CHANNELL, B. In this case I am of opinion that the rule nisi granted by the Court below ought to have been discharged, and that the judgment entered pro formâ to that effect (the Court having been equally divided) ought to be affirmed.

I have had the opportunity of reading the judgment of my Brother Blackburn, who has gone into the case very fully. I agree generally with him; but, considering the difference of opinion amongst the judges here as well as in the court below, I think it right to state shortly the grounds of my judgment.

We must take it that the custom set out in par. 29 of this appeal case was fully proved, and that the mode of dealing there described is the mode according to which business is done by the persons calling themselves brokers, in a market which we must take to be a known and established market, and which is called in the case "the London tallow-trade." The plaintiffs are persons acting as such brokers in that market, and dealing according to its usages. The defendant is a Liverpool merchant, not perhaps cognizant of the usages of the London tallow-market, but who chooses to employ the plaintiffs to buy tallow for him at that market. If he distinctly and expressly employed the plaintiffs to buy for him according to the usages of that market, the plaintiffs would clearly be entitled to recover in this action; for, according to the findings in this case, they have dealt in the matter throughout according to the usages. He has not, however, expressly employed them to buy according to the usages; and the question we have to decide, as it seems to me, is simply whether the actual employment of the plaintiffs by the defendant under the circumstances stated in the case is to be taken as the same as if he had expressly employed them to buy according to the usages.

The market being a known and established one, it becomes immaterial whether the defendant was aware of the usages or not. By choosing to deal or employ others to deal for him in such a market, where he might expect to find special usages, he became not necessarily bound by all the usages of the market,—that would depend upon the nature of the dealing,—but as much bound by them if he did not know them as if he did. This, I think, has been held in numerous cases; and I do not know that there is any difference of opinion in the Court upon the point. It was in fact his duty, before dealing or employing others to deal in such a market, to inquire as to its usuages, if he wished to provide against anything which he had not foreseen being done in pursuance of the contract. We may, therefore, disregard the element introduced into the case by the defendant's ignorance of the usage.

1872

MOLLETT
v.
ROBINSON.

The question, therefore, comes to this, was there anything in the express terms of the employment of the plaintiffs by the defendant so inconsistent with the usage, that the usage is to be taken to be excluded and not tacitly incorporated. The well-known rule that a usage varying a contract cannot be incorporated into it, is merely an example of the maxim "Expressum facit cessare tacitum." I can see nothing in the orders given by the defendant to the plaintiffs in this case to shew that what they were employed to do was so inconsistent with the course of dealing according to the usage, that it must be taken that the plaintiffs were not authorized to follow the usage.

7 HL 831.

It seems to me that it is begging the whole question to say that the plaintiffs were employed to act as brokers, if by that is meant, to act as ordinary brokers only. They were employed to "buy for me." It is true that they were not asked to "sell to me:" and, if I thought that the effect of the usage was necessarily to make the plaintiffs sellers to the defendant, I should say it was inconsistent with the employment. I do not, however, think that is the effect of the usage. The order is, "buy for me" simply (in one case, "buy for me on the best terms"). It is not "buy for me as an ordinary broker does," that is to say, "make a binding contract of sale and purchase between me and some third person." It is simply "buy for me;" and that, being addressed to a broker in the London tallow-trade, means "buy for me in the way a broker in the London tallow-trade does;" and that, again, by virtue of the usage means, "buy for my benefit in your own name; hand to me the goods when you get them; get them as cheaply as you can in the market; I will pay you the price you have to pay to the seller, and will pay you brokerage for your services." I can see nothing in such a mode of buying for another so inconsistent with a simple direction to buy as to prevent our construing as a direction to buy in that manner a simple direction to "buy for me," when addressed to a person who usually, and to the knowledge of the person giving the direction, buys for others in that manner.

I have already pointed out that, the usage being the usage of a known market, actual knowledge of it is immaterial. There is, in fact, nothing whatever to shew any intention on the part of the defendant to direct the plaintiffs to buy in any other manner than that in which they were accustomed to buy, and in which they did buy.

It seems to me, therefore, that the orders given by the defendant to the plaintiffs must be construed as if they had been, in express terms, "Buy for me according to the usages of the London tallow-market;" and consequently that the plaintiffs, having bought for him according to those usages, and having incurred liability at the defendant's request by so doing, are entitled to be reimbursed.

For these reasons, I think the judgment should be affirmed.

KELLY, C.B. I am of opinion that the judgment in this case should be affirmed.

The plaintiffs are brokers in the City of London, and on the 2nd of April, 1870, effected a purchase on behalf of the defendant of 50 tons, and on the 28th of April next following of 150 tons of tallow, and delivered to him notes of the purchases in the usual form, not naming the sellers. The plaintiffs, with a view to the execution of the defendant's orders, purchased the whole quantity, at various periods, of Simpson & Co., and of Rayner & Co.; not under two several contracts for 50 and 150 tons, but, having received orders from other buyers to purchase other quantities of the same tallow, made purchases of 150 tons and 200 tons respectively. When the time arrived for the delivery of the tallow, Simpson & Co. had failed, and the plaintiffs, having contracted with them for several other purchases and sales of tallow before the time for performance, settled the whole of these transactions by setting off the sales against the purchases, and paying or receiving the difference upon the whole of the contracts. The plaintiffs then, when the time had arrived for the delivery of the tallow to the defendant, having purchased the requisite quantities, tendered the tallow in due time to the defendant; when, tallow having fallen in price, and the defendant having ascertained that the tender was made by the plaintiffs, and not by Simpson & Co. and Rayner & Co., the sellers, he repudiated the contracts, and refused to accept the tallow; whereupon the plaintiffs brought this action to recover 362*l.* 4*s.* 5*d.*, the loss or difference in price which they had allowed to Simpson & Co.

1872

MOLLETT
v.
ROBINSON.

and Rayner & Co. And the question is, whether they are entitled to recover.

The defendant contends that, by reason of the purchase by the plaintiffs of the tallow in different quantities from those which he had ordered, he would have had no right of action against the sellers if they had failed to perform the contracts, and that there was in fact no privity between him and them; and that, the plaintiffs not having effected these purchases according to the duty and practice of brokers, he is not bound by the contracts entered into, and which are not such as he authorized the plaintiffs to make; and therefore that the plaintiffs cannot maintain this action.

The plaintiffs, however, rely upon the usage in the tallow trade in the City of London, to the effect that a broker, upon an order to purchase tallow as in the present case, is entitled to contract for the purchase of the quantity required, together with other quantities for which he may have received orders from other parties, including the whole in one and the same contract of purchase; and, further, that he may settle with the sellers as before mentioned, and then enforce the performance of the contract with the purchaser, suing in his own name; he, however, being always personally liable under the usage for the performance of the contract with the buyer, as if he had himself been the seller of the tallow.

The question for our consideration is, whether this usage is binding upon the defendant, who is a merchant residing and trading at Liverpool, and not in London, and whether it is a reasonable custom and so incorporated into the contract as to be binding on the defendant, and to enable the plaintiffs to recover.

The custom itself, as above set forth, is expressly found by the case; and the plaintiffs are found to have strictly conformed to the custom throughout these transactions; and I am of opinion that the custom is lawful and reasonable, and also that it is binding upon the defendant. It is true that this custom, as found, does not enable the defendant to enforce the performance of the contract by an action in his own name against the seller; but, inasmuch as it may well be that, from the nature of the tallow-trade, a broker may be often unable to effect a purchase of the specific quantity of tallow, neither more nor less, that a buyer may require, or to purchase it on terms as favourable to the buyer as upon the purchase of a larger quantity, I see nothing unreasonable in a custom which enables him, if he has several orders to buy for different purchasers, to execute them by purchasing of a seller a sufficient quantity to provide for the performance of all the contracts; he being himself, by force of the custom, personally liable to each of the buyers for the complete performance of each of the contracts.

It is objected that the purchaser, in such a case, if the broker becomes insolvent, being without the means of enforcing the contract against the seller, is deprived of the benefit of it altogether. But I think that the disadvantage to the defendant of being unable to sue the solvent seller, upon the insolvency of the broker, is rather apparent than real; for, if such had been the state of things in this case, and supposing the price of tallow to have risen, in which case only the defendant could have been interested in suing Simpson & Co., I am of opinion that he might have sued in the name of the plaintiffs, and the value of the 150 tons of tallow would have been recovered by the plaintiffs, or in their name, in trust for the defendant as to the 50 tons, and for the purchaser of the 100 tons as to the remainder. And, if the defendant's order and the plaintiffs' note of the contract had been so expanded as to embrace all these contingencies and to provide for them, there would have been no departure from the real intention of the parties, either as to the contract itself or the mode of carrying it into effect.

7253605

The direct operation of a custom upon any contract, and indeed the very essence of a custom, inasmuch as it is supposed to be known to both parties, is, to make it as much a part of the contract itself as if it had been expressly recited or stated in it. If the contract here to all that it contains had added the words hereafter following, it appears to me that the contract would have been reasonable and just to all parties, and that which, if the parties knew of the custom, they must actually have intended,—"It is hereby agreed that the broker may purchase of the seller any larger quantity of tallow than 50 tons, in order to supply other contracting parties; provided that the buyer shall, if he thinks fit, be at liberty to sue the seller in the name of the broker, and that the broker hereby guarantees the performance of the contract by the seller."

As to the objection that the broker in fact becomes the seller, I need say no more than that he becomes so only to the same extent as in the common case of a broker guaranteeing the performance of the contract by the seller. If all parties remain solvent, no difficulty arises. If the broker becomes insolvent, the remedy above pointed out is open to the buyer. If the seller be insolvent, as here, the broker must perform the contract with the buyer. Why should the buyer in either case escape the performance of the contract as against the one party or the other?

So, I think that the defendant, upon authority as well as on principle, although carrying on business at Liverpool, must be taken to have known, or, if not, that he must be content to be bound by the custom of the tallow-trade in London, if he think fit to instruct a broker there to effect a purchase on his behalf. The custom in London is universal; and a broker, as before observed, would be often unable to comply with an order to purchase, or to effect the contract on terms equally favourable to the buyer, unless by availing himself of the custom. And, having done so in the transaction in question, I am of opinion that he is justified by the custom, which, being reasonable in itself and binding upon the defendant, entitles the plaintiffs to maintain this action.

The Court being thus equally divided, the judgment of the Court below discharging the rule, was affirmed.

Judgment affirmed.

Attorneys for plaintiffs: *Thomas & Hollams.*
Attorneys for defendant: *Simpson & Cullingford.*

LEE AND OTHERS *v.* WALKER.

1872
Feb. 9.

8Ch 61,-4,

Negligence—Practice as to obtaining Letters-Patent.

On the 28th of April, 1870, the plaintiffs retained the defendant, a patent-agent, to obtain for them letters-patent for "A new automaton vase or depôt for holding coals," and on the 30th a provisional specification was filed. Nothing more was done by the defendant until the end of August, when he gave notice of his intention to proceed with the patent, pursuant to s. 12 of 15 & 16 Vict. c. 83; and in October he applied for the fiat of the Attorney-General for sealing the patent.

In the meantime, viz. on the 15th of June, 1870, one P. had, as the defendant was aware, filed a provisional specification for "Improvements in coal vases," which turned out to be substantially the same as the plaintiffs' invention, and had on the 10th of September obtained a grant of letters-patent for the same.

The Attorney-General rejected the plaintiffs' application, upon the authority of *Ex parte Bates* (Law Rep. 4 Ch. 577), where under similar circumstances the second applicant for provisional protection, in the absence of fraud, was held entitled to have his letters-patent sealed, of which decision, though pronounced in May, 1869, the defendant was ignorant,

Held, that there was evidence of negligence on the part of the defendant.

THE first count of the declaration stated that, in consideration that the plaintiffs would employ the defendant, as and being a patent-agent, as their agent to procure in the name of Absolom Evans certain letters-patent for an invention of "A new automaton vase or depôt for holding coals or other substances," for reward to the defendant, the defendant promised the plaintiffs that he would use due and proper care and skill in and about endeavouring to procure the said letters-patent; that the plaintiffs, relying on the promise of the defendant, did employ the defendant as aforesaid, and on the terms aforesaid; and that all times elapsed necessary to entitle the plaintiffs to have the defendant do what he promised to do, and to sue him for the breach thereinafter mentioned; yet that the defendant did not use due and proper care and skill in and about endeavouring to procure the said letters-patent, but so carelessly and negligently conducted himself in endeavouring to procure the same that he failed to procure them; whereby the plaintiffs, to whom Evans had agreed to assign the benefit of the invention and of the letters-patent when obtained, lost all the profits and benefit which would have accrued to them from the said letters-patent, &c.

Third count, for money received by the defendant to the plaintiffs' use, and money found due upon accounts stated.

Pleas: 1. To the first count, a denial of the promise; 2. To the same, that the defendant did use due and proper care and skill in and about the endeavouring to procure the letters-patent, and did not carelessly or negligently conduct himself in endeavouring to procure the same; 4. To the last count, never indebted. Issue.

At the trial before Lush, J., at the Staffordshire Summer Assizes the facts proved were as follows:—One Evans, who was in the employ of the plaintiffs, japanners and tin-plate workers at Wolverhampton, having invented a new automaton vase for holding coals, and having agreed to assign the benefit of the invention to the plaintiffs, they, on the 28th of April, 1870, employed the defendant, a patent-agent, to take the necessary steps for patenting the invention. Accordingly a provisional specification was prepared and filed by him on the 30th of April, 1870. On the 9th of August the plaintiffs received a letter from the defendant, reminding them that the time was drawing near for giving notice to proceed (1), and requesting them to forward him 10*l.* on account of duties (which they did). In this letter the defendant intimated that one Perman, of Birmingham, had applied for letters-patent for "Improvements in Coal Vases," but that he could not ascertain what the improvements were until the end of the year. The defendant duly gave notice to proceed with the patent, and within three weeks after the advertisement thereof appeared in the *London Gazette*, viz. on the 13th of September, 1870, Perman gave notice that he objected to the letters-patent being granted to Evans, upon the ground "that the said Absolom Evans is not the first and true inventor of the said invention, the same having been previously invented by me, and letters-patent, bearing date the 15th of June, 1870, having been already granted to me for the said invention."

A copy of this notice of objection was forwarded by the defendant to the plaintiffs, on the 19th of September, 1870, accompanied by a letter containing this passage:—"I have received notice of

(1) Notice of intention to proceed with the patent must be given within four months from the filing of the provisional specification: see 15 & 16 Vict. c. 83, s. 12.

objection (a copy of which I inclose) to the grant of letters-patent for your new automaton vase, applied for on the 30th of April, and which you will see is weeks before Perman applied, viz. the 15th of June. His patent was sealed on the 10th instant. Perman, I believe, cannot prevent you getting your patent sealed, and it will be dated prior to his; and, furthermore, I do not believe he can prove his allegations;" and in a postscript was added—"I have not the least doubt as to my ability to carry your patent through."

In a letter of the 20th of September, 1870, the defendant repeated his previous statement as to the worthlessness of Perman's patent, and requested "a cheque for, say, 15*l.* or 20*l.*, that I may apply for the report and seals at once."

A further sum of 15*l.* was accordingly remitted to the defendant on the 22nd of September. And on the 8th of October he obtained from the plaintiffs a further sum of 20*l.*, which he represented as necessary to pay fees.

On the hearing, on the 11th of October, the Attorney-General refused his fiat for the sealing of the plaintiffs' patent, upon the authority of *Ex parte Bates* (1), where it was held, that leaving a provisional specification at the patent-office, and obtaining provisional protection, does not prevent a second applicant from leaving a provisional specification of a similar invention, and obtaining valid letters-patent for the invention, before six months have elapsed from the time when the first provisional specification was left; and that, in such case, letters-patent will not be granted to the first applicant for any part of his invention which is covered by the letters-patent already obtained by the second applicant.

Prior to that decision, which took place on the 25th of May, 1869, a general opinion had prevailed that, under the Patent Law Amendment Act, 15 & 16 Vict. c. 83, a provisional specification secured the invention for six months, and that, notice to proceed with the patent being given at the expiration of the first four months, and a complete specification being filed within six months, the letters-patent would be granted as of the date of the petition. The defendant was ignorant of that decision; and this was the negligence relied on.

A verdict was, under the direction of the learned judge, taken for the plaintiffs for an agreed sum of 31*l.* 10*s.*, leave being reserved to the defendant to move to enter a nonsuit, if the Court should be of opinion that there was no evidence of negligence to go to the jury.

---

(1) Law Rep. 4 Ch. 577.

A rule to shew cause having been obtained accordingly,

Anstie (*H. Matthews, Q.C.*, with him,) shewed cause. The defendant, who held himself out as a patent-agent, was bound to possess a reasonable degree of skill and knowledge in the law and practice respecting the grant of letters-patent. He was consequently guilty of actionable negligence in allowing so long a time to elapse between the filing of the provisional specification and the notice of his intention to proceed with Evans's patent, as to give a rival inventor an opportunity to intervene and perfect his letters-patent in the interim. His letter of the 9th of August, 1870, shews that the defendant had abundant warning of the impending danger; and, if he had then been aware, as he ought to have been, of the decision in *Ex parte Bates* (1), he might have averted it.

Lawrence (*J. O. Griffits* with him) in support of the rule. The only negligence that can be imputed to the defendant is that he was unaware of a recent decision by which the old practice as to the obtaining of letters-patent was entirely changed. No doubt, as a patent-agent, he was bound to possess a reasonable degree of skill and knowledge of his profession; but he was not bound to be so intimately conversant with the law as to know the precise effect of the decision of *Ex parte Bates*. (1) The law allows a patentee six months from the date of the provisional specification for filing a complete specification; notice to proceed being given at the expiration of the first four months. Can it be said that the defendant was negligent in delaying the necessary steps only for the periods allowed by law? Such a delay was always usual, and is frequently essential to the interest of the patentee. The defendant could have no notice of the precise character of the invention for which Perman's patent was taken out until the decision of the Attorney-General, on the 11th of October. The title would give him none.

(1) Law Rep. 4 Ch. 577.

1872

LEE
v.
WALKER.

BYLES, J. In this case the rule calls upon the plaintiffs to shew cause why a nonsuit should not be entered, if this Court should be of opinion that there was no evidence of negligence. My Brother Lush, acting as judge and jury, directed a verdict for the plaintiffs. We ought not to interfere with that direction, unless we can clearly see that the learned judge was wrong in his view of the facts. I do not see that he was wrong; nor am I satisfied that I should not have come to the same conclusion that he came to. There were two facts before him which in my judgment tend to establish negligence on the part of the defendant: 1. The long interval between April and October which he suffered to elapse before he took steps to make the plaintiffs' patent available; 2. his ignorance of the decision in the case of *Ex parte Bates* (1), which, had he been aware of it, as I think he ought to have been, would have apprised him of the danger he was incurring. These grounds seem to me enough to sustain the verdict.

BRETT, J. The defendant undertook for reward to act for the plaintiffs as a skilled agent in obtaining a patent for them. He was, therefore, bound to bring reasonable and ordinary care and knowledge to the performance of his duty as such skilled agent. It is suggested that the defendant did not bring reasonable and ordinary care and skill, because he unnecessarily delayed applying to the Attorney-General for his fiat to get the letters-patent sealed, from the 28th of April, when he was instructed, until October. Now, if there had been no such decision as *Ex parte Bates* (1), I must confess I should not have thought that evidence of want of care and skill. The delay would not have been greater than was consistent with the exercise of ordinary care and skill. The ordinary practice was, to wait until the expiration of four months before giving notice of intention to proceed with the patent, and then to wait two months more before filing a complete specification and obtaining the great seal to be affixed. But in May, 1869, the case of *Ex parte Bates* (1) was decided by the Lord Chancellor, which totally altered the practice in this respect. I entirely agree that an agent of this kind is not bound to be accurately acquainted with the

---

(1) Law Rep. 4 Ch. 577.

1872

Lee v. Walker.

whole law of patents: but I think he is bound to know the law as to the practice of obtaining patents; and, as this was a most important decision with respect to the sealing of patents, the very practice the conduct of which he undertook for reward, I think he was bound to know it. Since that decision, patent-agents are not entitled to carry on their business as they had done before. If the defendant had regulated his course according to that decision, he would not have delayed so long in proceeding to perfect the patent which he was employed to obtain. For that delay he is I think responsible, especially as he was well aware that a second provisional protection had been obtained for a similar invention. I am clearly of opinion that there was some evidence of negligence to justify a jury in finding for the plaintiffs.

Grove, J. I am of the same opinion. Had this case occurred prior to the decision of *Ex parte Bates* (1), I must confess I should have entertained great doubt. In obtaining letters-patent certain steps are to be taken at given periods, and certain fees are to be paid on the taking of each of these steps. It is not unreasonable that the agent should be anxious to save his client from an outlay that might turn out to be unnecessary. The invention might be of little value. If therefore the case had stood only upon the delay in giving notice of his intention to proceed with the patent until the end of the prescribed period, I should have hesitated to say that he was guilty of negligence. So, again, I should have hesitated to hold the defendant guilty of negligence by reason of his being ignorant that Perman's invention was in substance the same as Evans's; for, as Mr. Lawrence very properly observes, he could not know that simply from the title. But I cannot help thinking that he was guilty of some negligence in not taking care to inform himself of a decision which operated so important a change in the practice as to the obtaining of patents. We all know that patent-agents are fully alive to all the decisions which take place upon the subject of patents: and I think we may fairly hold it to be part of the duty of one who holds himself out as one skilled in that branch of professional knowledge, to become acquainted with a decision which had so

(1) Law Rep. 4 Ch. 577.

important a bearing upon the practice. It is now necessary to get a patent sealed as soon as possible, in order to prevent a rival inventor from stepping in as Perman did in this case. I cannot say that ignorance of that change in the practice was not some evidence of negligence.

Rule discharged.

Attorney for plaintiffs: *J. Needham, for Bolton, Waterhouse, & Bolton, Wolverhampton.*

Attorneys for defendant: *Wright & Venn, for Anderson, Collins, & Robinson, Liverpool.*

RICHARDS *v.* GELLATLY AND OTHERS.

Jan. 31.

Practice—Inspection of Documents.

In an action at the suit of a passenger against the agents to a ship, for alleged false and fraudulent representations as to the character, accommodation, and qualities of the ship, the Court refused to allow the plaintiff to inspect letters from other passengers to the defendants, complaining of the condition of the ship, and refusing to proceed in her (some of which complaints had been met by a return of part of the passage-money), and also letters from the captain and the owner written after such complaints.

The mere fact that such letters might afford materials for a cross-examination of the defendants' witnesses, is no ground for inspection.

THE first count of the declaration stated that, in consideration that the plaintiff would engage from the defendants a passage then offered by the defendants to the plaintiff for himself, his wife, &c., in a ship called the *Ferdinand de Lesseps*, on a voyage from London to Madras, and would embark, &c., and pay the defendants 183*l.* 15*s.* for the passage, the defendants promised the plaintiff to provide him such passage, and that the ship was tight, staunch, and sound, and sufficiently equipped for the voyage, and convenient and appropriate for the conveyance of passengers, and in a proper state for their reception, and capable of propelling herself by steam throughout the entire course of the voyage; that the plaintiff, relying on the said promise, engaged the passage, and embarked with his wife, &c., and paid the defendants 183*l.* 15*s.*: Averment of performance of conditions by plaintiff: Breach, that the ship was not tight, staunch, and sound, or sufficiently equipped for the voyage, or convenient and appropriate for the conveyance of passengers, or in a fit state for their reception, or capable of propelling herself by steam throughout the entire course of the voyage; but was leaky, unsound, and deficient in engine-power, and was in an unfit state for the reception of the plaintiff and his wife, &c., and they were unable to complete the voyage, and were compelled to disembark after the performance of a portion thereof, &c.

The second count stated that the defendants, by fraudulently representing to the plaintiff that the *Ferdinand de Lesseps* was about to undertake her first voyage, and was a good and substantial vessel, and fit to perform the voyage in an efficient manner, and capable of propelling herself by steam throughout the entire course of the voyage, induced the plaintiff to pay them 183*l.* 15*s.* as and being the passage-money for himself, his wife, &c., in the said ship, and to embark, &c., whereas in truth and in fact the ship was not about to undertake her first voyage, and was not a good and substantial vessel, nor was she fit to perform the voyage in an efficient manner, nor capable of propelling herself by steam during the entire course of the voyage, as the defendants at the time of making the representation well knew, &c.

The third count stated that the defendants were engaged in the business of carriage of passengers by sea to India, and were also passage agents and brokers, and the plaintiff was desirous of obtaining a passage for himself, his wife, &c., from England to Madras, by way of the Suez Canal, on board a fast and commodious steam-vessel fit for the carriage of passengers on that voyage, whereof the defendants had notice; and thereupon the defendants, in order to induce the plaintiff to take a passage by the vessel thereinafter mentioned, and to believe that the said steam-vessel was a new and commodious full-power steam-vessel, constructed specially for the route by the Suez Canal, and fit for the said traffic, and capable of effecting a fast passage to Madras from England, falsely and fraudulently represented and caused to be represented to the plaintiff that the name of the vessel was the *Ferdinand de Lesseps*, that she was about to sail on her first voyage to India, and that she would steam out the whole way; whereas, in truth and in fact, she was an old vessel named the *Indiana*, of bad reputation as a slow and inconvenient vessel, the name of which had been fraudulently changed to the *Ferdinand de Lesseps*, as the defendants well knew, and the vessel was not then about to sail on her first voyage, as the defendants then well knew. Claim, 1000*l*.

Pleas, 1. A denial of the promise; 2. That, before breach, the plaintiff exonerated and discharged the defendants from the performance of the alleged promise; 3. To the first count, that the ship was tight, staunch, and sound, and sufficiently equipped for the voyage, and convenient and appropriate for the conveyance of passengers, and in a fit state for their reception, and capable of propelling herself by steam throughout the entire course of the voyage; 4. To the second and third counts, not guilty. Issue.

The *Ferdinand de Lesseps*, having started on her voyage, put into Cowes in a leaky state. The plaintiff and some of the other passengers left her on the 21st of December, 1870, and refused to proceed in her, upon grounds assigned by them in certain letters subsequently addressed by them to the defendants, who were the agents for the ship; and some of them claimed and received through the defendants compensation. During the stay of the vessel at Cowes, viz. on the 19th of December, 1870, and again on the 13th of February, 1871, Captain Johnston, the master of the *Ferdinand de Lesseps*, wrote and sent to the defendants letters relating to the plaintiff and his leaving the vessel.

In answer to interrogatories, the defendants admitted the receipt and possession of the above-mentioned letters, and also of several others from the plaintiff and other passengers who had so left the ship at Cowes, and of a report of the pilot dated the 21st of December, 1870, and addressed to the defendants, and two letters from the owner of the vessel, dated after the passengers had left her; but they claimed no privilege in respect of either of these documents.

Upon a summons for inspection, Cleasby, B., made the following order:—"Upon hearing counsel on both sides, I do order that, on payment of 6*s*. 8*d*. costs, and 4*d*. per folio for copy, the plaintiff or his attorney or agent be at liberty to inspect and take a copy of or extracts from the documents set forth in the defendants' affidavit in answer to interrogatories sworn herein on, &c., except letters of other passengers and letters of captain and owner subsequent to the 21st of December, 1870; without prejudice to application to the Court in respect of letters of other passengers," &c.

Murphy, by way of appeal from the above order, moved for leave to inspect the documents inspection of which had been disallowed at chambers. The plaintiff, in order to maintain the action, must shew that the representations upon which he was induced to take his passage were false to the knowledge of the defendants. The letters of complaint of his fellow-passengers followed by a return of part of the passage-money, would be cogent evidence for that purpose.

[WILLES, J. How could a compromise of a claim made by another passenger afford any evidence in support of the claim of the plaintiff in this action?]

The letters might, at all events, furnish materials for the cross-examination of the adverse witnesses.

[GROVE, J. Do you find any case where inspection has been allowed upon that ground?]

It must be conceded that there is no case precisely to the point. As to the letters of the captain, the learned judge allowed inspection of such as were sent down to the time of the passengers leaving the ship; but he disallowed inspection of those written subsequently to that date. The question is whether the plaintiff is not entitled to have access to all. The letters from the owner of the ship to the agents (the defendants) ought also to be inspected. They would be most material to throw light upon the matters in dispute.

[WILLES, J. In the case of a railway accident, the reports usually made to the secretary or traffic-manager upon the occurrence are allowed to be inspected; but not communications made to them by the servants of the company in anticipation of or after the commencement of litigation: see *Woolley* v. *North London Ry. Co.* (1)]

The defendants in their affidavit claim no privilege in respect of any of the documents sought to be inspected; and it is too late now to set up such a claim.

---

(1) Law Rep. 4 C. P. 602.

[WILLES, J. No judge would allow such an objection to prevail. If insisted upon, he would allow the affidavit to be amended.]

WILLES, J. I see no ground for interfering with the decision of my Brother Cleasby as to the letters from the plaintiff's fellow-passengers. It seems to have been at one time thought that a duty was cast upon the recipient of a letter to answer it, and that his omission to do so amounted to evidence of an admission of the truth of the statements contained in it. But that notion has been long since exploded and the absurdity of acting upon it demonstrated. It may be otherwise where the relation between the parties is such that a reply might be properly expected. Here, however, the communications between the defendants and other passengers was entirely apart from the contract between the plaintiff and the defendants. The answers to them might be altogether irrelevant to the plaintiff's case. If it could be shewn that those letters related to some common matter in dispute between all the parties, the case might be different. Mr. Murphy has not satisfied me that the learned Baron has come to a wrong conclusion. As to the letters from the master, he has properly conceded that they fall within the rule respecting communications from the inferior to the superior servants of a railway company. I think there should be no rule.

BYLES, J. I am of the same opinion. Letters written after the commencement of an action, or after lis mota, clearly would not be admissible for any purpose. Neither would communications with a view to compromises of claims made by third persons.

BRETT, J. As to the passengers' letters, they clearly would not be admissible under the first count of the declaration. But it is suggested that they might be evidence in support of the second and third counts. Under these, the plaintiff would have to make out that the representations charged were false to the knowledge of the defendants; and the contention is that letters from other passengers complaining of the state of the ship would be admissible in evidence for that purpose. Those letters, however, could not have been put in evidence by the plaintiff: and the fact that

1872

RICHARDS v. GELLATLY.

documents might afford useful materials for cross-examination has never been held a ground for inspection. I can see how these letters might be used for the purpose of creating a prejudice,—to shew that the defendants, having claims made upon them for compensation, perhaps of small amount, thought fit to yield to them rather than incur the trouble and expense of litigation. As to the letters written by the captain after the dispute had arisen, they are clearly not such as a captain in ordinary course writes to his owners. I see no reason why they should be shewn. The owner's letters fall within the same rule.

Grove, J. I am of the same opinion.

Rule refused.

Attorneys for plaintiff: *G. L. P. Eyre & Co.*

Feb. 9.

COOK *v.* GUERRA.

Mortgage—Notice of Grant within 4 *Anne*, c. 16, s. 10—*Pre-payment of Rent.*

In July, 1864, L. demised premises to defendant for five years at a rent of 55*l.* per annum, payable quarterly. Immediately after the grant of the lease, defendant advanced to L. 170*l.* on account of rent; and in September, 1865, L. mortgaged the premises to plaintiff.

In May, 1866, B., who claimed under a prior mortgage from L. dated in September, 1858, through C., his attorney, commenced an action of ejectment against defendant to recover possession of the premises, but did not proceed with it; and on the 1st of November, 1866, plaintiff's attorney wrote to defendant: "Mr. C. has written to say his clients are no longer entitled to receive your rent. I therefore request that you will have the kindness to pay the same here by Monday next:"—

Held, that the pre-payment of rent was no bar to plaintiff's claim to the rent accruing after defendant had notice that plaintiff was grantee of the reversion; and that the above letter, coupled with the circumstances known to defendant (that he was raising money by mortgaging his reversion, and that the plaintiff's claim, for rent, could hardly be founded upon any other alleged right than one resulting from a grant of the reversion), would warrant a jury in inferring that defendant had notice that plaintiff was such grantee.

This was an action to recover the sum of 137*l.* 10*s.*, for two and a half years' rent due at Christmas, 1867.

At the trial before Brett, J., at the sittings at Westminster after last Trinity Term, the facts proved were as follows:—On the

7th of July, 1864, a lease of the premises in question was granted by one Lamb to defendant for five years at a rent of 55*l.* a year, payable quarterly. Shortly after the lease the defendant paid to Lamb as rent in advance 170*l.* In September, 1865, Lamb conveyed the reversion in the premises, by deed, by way of mortgage, to plaintiff for an advance. In August, 1866, Lamb gave a further mortgage to plaintiff for a further advance. In May, 1866, one Banchini claimed to recover possession of the premises from defendant, and, by one Carpenter, his attorney, brought an action of ejectment against defendant. According to an affidavit made in the present cause by defendant, Banchini made known to him, defendant, and to his attorney, in May, 1866, that he claimed as mortgagee by virtue of a mortgage from Lamb. The defendant appeared by attorney to the action. It was not pressed: and on the 1st of November, 1866, one J. R. Cook, plaintiff's attorney, wrote to defendant, and, according to defendant's affidavit above referred to, wrote on behalf of plaintiff. The letter was as follows:—" Sir,—Mr. Carpenter has written to say his clients are no longer entitled to receive your rent. I therefore request that you will have the kindness to pay the same here by Monday next." (Signed) J. R. Cook. The defendant thereupon consulted his attorney, Mr. Walker, who on the 2nd of November, 1866, wrote to J. R. Cook, the plaintiff's attorney, asking for information. None was given; and no further step was taken until the present action was brought. The defendant and his attorney made affidavits for the purpose of obtaining orders for interrogatories and inspection of documents. In the affidavit for the latter purpose defendant vouches a mortgage-deed given by Lamb to Banchini on the 27th of September, 1858.

A verdict was, by consent, taken for plaintiff for 137*l.* 10*s.*, being two years' and a half rent down to Christmas, 1867, at 55*l.* per annum; with leave to defendant to set such verdict aside and enter a verdict for defendant, or to reduce the amount recovered by such a sum as the Court should direct; the Court to have power to draw inferences of fact.

A rule was obtained calling upon plaintiff to shew cause why a verdict should not be entered for defendant, or the damages reduced by 87*l.* 10*s.*, or such other sum as the Court might direct, on the ground that the plaintiff failed to prove that notice had been given to the defendant of the grant of the reversion to the plaintiff, within the meaning of 4 Anne, c. 16, s. 10. (1)

1871. Nov. 15. *Montagu Chambers, Q.C.*, and *Gibbons*, shewed cause. The facts are shortly these:—In July, 1864, one Lamb by agreement demised the premises in question to the defendant for five years from Midsummer at a rent of 55*l.* per annum, payable quarterly. In September, 1865, Lamb mortgaged the premises to the plaintiff for an advance of 225*l.*, and on the 16th of August, 1866, he further mortgaged them to the plaintiff for an advance of 289*l.* There had been a prior mortgage, in September, 1858, to one Gaspar Banchini, of which the defendant had notice by an action of ejectment having been brought against him by Banchini in May, 1866. That action, to which the plaintiff entered an appearance, was abandoned; and Banchini's mortgage appears to have been paid off by the present plaintiff. The plaintiff now claims to recover from the defendant 137*l.* 10*s.*, being two and a half years' rent, at 55*l.* per annum, due at Christmas, 1867. The answer set up is, that, shortly after the premises were leased to him, the defendant made payments in advance to Lamb on account of rent, amounting to 170*l.*; and he claims to deduct that sum from the rent now sued for. Now, although the statute 4 Anne, c. 16, s. 10, protects tenants in respect of payments of rent bonâ fide made before notice of an assignment of the reversion;

(1) Sect. 9 enacts that, "from and after the first day of Trinity Term (1705), all grants or conveyances thereafter to be made, by fine or otherwise, of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual to all intents and purposes without any attornment of the tenants of any such manors, or of the land out of which such rent shall be issuing, or of the particular tenants upon whose particular estates any such reversions or remainders shall and may be expectant or depending, as if their attornment had been had and made."

Sect. 10: "Provided, nevertheless, that no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor or conusor, or by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the conusee or grantee."

yet, that proviso only applies to payments which are made in accordance with the contract. Pre-payments are not within its protection: *De Nicholls* v. *Saunders.* (1) The law is well explained by Willes, J. (2): "That statute did away with the necessity for attornment, but protected the tenant in cases where he had paid the rent due from him before notice of the assignment: this provision of the statute, however, clearly applies to the fulfilment of an obligation to pay rent imposed by the lease. There has been no such payment here; for, payment of rent before it is due is not a fulfilment of the obligation imposed by the covenant to pay the rent, but is in fact an advance to the landlord, with an agreement that on the day when the rent becomes due such advance shall be treated as a fulfilment of the obligation to pay the rent." The plaintiff is, therefore, clearly entitled to recover all rent accruing subsequently to the mortgage to him in September, 1865, or, at all events, all rent that accrued subsequently to the claim made by Banchini (under whom the plaintiff claims), viz. in May, 1866.

[WILLES, J. Banchini's notice must be taken to have been withdrawn. He commenced an action, but did not proceed with it. Banchini's claim, therefore, is out of the question.]

Then the plaintiff must rest upon the notice contained in the letter from his attorney to the defendant, dated the 1st of November, 1866.

[WILLES, J. If that amounts to a notice, the plaintiff will be entitled to a verdict for 62*l.* 10*s.*]

Paterson, in support of the rule. If the Court are prepared to hold that the letter of the 1st of November, 1866, gave the defendant such a notice that the plaintiff was grantee of the reversion as entitled him to claim the rent from that time, there is an end of that part of the case. But it is submitted that that letter does not convey such information as the defendant was entitled to have. The pre-payments at all events covered the rent accruing down to Michaelmas, 1866.

[WILLES, J. I am not aware of any authority precisely in point. But there are cases as to notices of an act of bankruptcy, which have always been held sufficient without shewing precisely what was the nature of the act of bankruptcy relied on (1).]

---

(1) Law Rep. 5 C. P. 589.

(2) Law Rep. 5 C. P. at p. 594.

Willes, J. Upon one point we entertain no doubt, viz. that, assuming that the letter of the 1st of November, 1866, was a notice of a grant of the reversion within s. 10 of the 4 Anne, c. 16, that notice only gave the plaintiff a right to recover the rent accruing subsequently thereto. We consider that, although the rent was pre-paid in the year 1864, so as to cover so much of the five quarters claimed as became due prior to the notice of the grant to the plaintiff, such pre-payment affords no answer as to the residue. That is clearly and distinctly laid down in *De Nicholls* v. *Saunders*. (2) When rent becomes due, the previous advance becomes actual payment: Vin. Abr. Payment (I.). The good sense of the thing is so. The accord is then consummated by satisfaction. We are all of opinion that such a payment comes within s. 10 of the statute of Anne, and is not to be disturbed by any subsequent notice of a transfer of the reversion. The defendant is consequently entitled to have the verdict reduced to 62*l.* 10*s.* Mr. Paterson, however, contends that the letter of the 1st of November, 1866, does not amount to a notice within the statute. If that be so, he is relieved altogether. As this is a somewhat novel point, it will be more satisfactory if we take time to consider it.

Cur. adv. vult.

Feb. 8. The judgment of the Court (Willes, Keating, and Brett, JJ.) was delivered by

Brett, J. In this case the plaintiff sought to recover from the defendant the sum of 137*l.* 10*s.*, as rent for two years and a half due at Christmas, 1867. At the trial a verdict was, by consent, taken for the plaintiff for 137*l.* 10*s.*, with leave to the defendant to move to set that verdict aside and enter a verdict for the defendant, or to reduce the amount recovered by such a sum as the Court should direct. The Court was to have power to draw inferences of fact. A rule nisi according to the terms of the leave reserved having been obtained, the case was argued before us. [His Lordship stated the facts.]

---

(1) See *Conway* v. *Nall*, 1 C. B. 643; *Turner* v. *Hardcastle*, 11 C. B. (N.S.) 683; 31 L. (C.P.) 193.

(2) Law Rep. 5 C. P. 589.

It was urged on behalf of the defendant, that no notice had been given to him of any conveyance of the reversion to the plaintiff; and, consequently, that he was protected by reason of his payments to Lamb without such notice, and by statute 4 Anne, c. 16, s. 10, against any claim by the plaintiff; that the want of notice distinguished this case from that of *De Nicholls* v. *Saunders* (1); that, at all events, the verdict must be reduced to so much as would represent the rent payable after the 6th of November, 1866; that the payment in advance was good as against the plaintiff until notice was given. The Court acceded to the last contention, and took time to consider as to the former.

It seems clear to us that, if there was a sufficient notice given in November, 1866, the pre-payment is not a pre-payment of rent as against the plaintiff's claim for rent from and after such notice: and, if there was not a sufficient notice, the plaintiff is not in this case entitled to recover at all: in such case the pre-payment is good, and covers the whole claim. The question therefore is, whether there was or was not a sufficient notice given to the defendant by or on behalf of the plaintiff that he, the plaintiff, was on the 6th of November, 1866, claiming the rent as grantee, by being mortgagee of the reversion.

The question is not whether the letter gives such notice in terms, but whether, from the letter and the circumstances, the Court ought to infer that the letter brought such knowledge to the mind of the defendant or his attorney, or both. Now, the defendant or his attorney knew that Banchini had claimed the premises as mortgagee from Lamb, and, consequently, they knew that Lamb was raising money by mortgaging the reversion; that the claim made on behalf of the plaintiff was not to dispossess the defendant, but only to be paid by him the rent; that such a claim could hardly be founded upon any other alleged right than one resulting from a grant of the reversion.

Considering these propositions, we are of opinion that there was evidence from which a jury might properly draw the inference that the letter, coupled with the circumstances known to the

---

(1) Law Rep. 5 C. P. 589.

1872

Cook
v.
Guerra.

defendant and his attorney, did bring to the mind of one or both of them that the plaintiff was claiming the rent as grantee by way of mortgage of the reversion, as in truth he was. We are therefore of opinion that there was sufficient notice, and that the plaintiff is entitled to recover so much of the rent claimed by him as would be due, if unpaid, from the 6th of November, 1866.

The verdict must, therefore, be reduced by all which exceeds that amount.

Rule absolute to reduce the verdict to 62*l.* 10*s.*

Attorney for plaintiff: *J. R. Cook.*
Attorneys for defendant: *Walker, Twyford, & Belward.*

Feb. 9.

EVANS *v.* ROE AND OTHERS.

Contract for Service—Weekly Hiring—Parol Evidence to vary Written Contract—Statute of Frauds—Bespeaking Judge's Notes.

The plaintiff entered the service of the defendants under a memorandum in writing, as follows:—"April 13th, 1871. I hereby agree to accept the situation as foreman of the works of Messrs. Roe & Co., flock and shoddy manufacturers, &c., and to do all that lays in my power to serve them faithfully, and promote the welfare of the said firm, on my receiving a salary of 2*l.* per week and house to live in from the 19th of April, 1871:"—

Held, a weekly hiring from the 19th of April, 1871; and that evidence of a conversation at the time of signing the contract, tending to shew that a hiring for a year was intended, was not admissible.

The stamp of 5*s.* on bespeaking judges' notes is sufficient only where the cause is tried before a judge of the court in which the rule nisi is granted. Where the trial is had before a judge of another court, a further fee of 6*d.* per folio is payable.

The declaration stated that the plaintiff and defendants agreed that the plaintiff should serve the defendants, and that the defendants should retain and employ the plaintiff in their service in a certain capacity, to wit, that of a foreman, at certain wages and salary, to wit, 2*l.* per week and a house to live in, for a certain time, to wit, for one year; that the plaintiff resided and was received into the service of the defendants under and in pursuance of the agreement, and that he did all things necessary on his part to entitle him to be continued in such service until the same was duly determined; yet the defendants, during the said period of service, and before the same was duly determined, dismissed the plaintiff from the said service, and put an end to the relation created by the said agreement, and had from thence hitherto refused to continue the plaintiff in their service or find him a house to live in, whereby the plaintiff was deprived of the wages and advantages which he would have derived from the service, &c.

The defendants pleaded a denial of the contract as alleged; and, further, that it was part of the terms of the agreement that the defendants might determine and put an end to the service and dismiss the plaintiff from it at the expiration of a week after giving the plaintiff notice of their intention so to do; that the defendants gave the plaintiff one week's notice of their intention to determine and put an end to the service and dismiss him from it; and that, at the expiration of a week after the giving of such notice, the defendants determined and put an end to the service and dismissed the plaintiff from it, as they lawfully might, &c. Issue thereon.

The cause was tried before Blackburn, J., at the last assizes at Croydon. The plaintiff, who had formerly carried on the trade of a shoddy maker in Gloucestershire, applied to the defendants, rag-merchants at Mitcham, who contemplated entering into the shoddy trade, for employment, and they agreed to engage the plaintiff as foreman, upon the terms mentioned in the following memorandum, which was drawn up in duplicate by one of the defendants, and one part signed by each of the parties:—

"April 13, 1871.

"Messrs. James Thorne Roe & Co., Mitcham.

"I hereby agree to accept the situation as foreman of the works of Messrs. J. T. Roe & Co., flock and shoddy manufacturers, &c., and to do all that lays in my power to serve them faithfully, and promote the welfare of the said firm, on my receiving a salary of two pounds per week and house to live in from 19th April, 1871."

Before signing the agreement, the plaintiff asked the defendants if the engagement was to be understood to be an engagement for a year, and one of the defendants answered, "Yes, certainly." The reason why the service was to commence at a future day was that the plaintiff had to bring his family from Gloucestershire. A house

1872

EVANS
v.
ROE.

was hired by the defendants for the plaintiff for one year from the 19th of April. The plaintiff remained in the service of the defendants and in the occupation of the house until the 3rd of June, when they gave him a week's wages, and dismissed him.

On the part of the defendants it was objected that, upon the true construction of the memorandum, the hiring was a weekly one, and therefore determinable by a week's notice or payment of a week's wages; and that, assuming the evidence of what passed by parol at the time of signing the agreement to be admissible, the contract was void by the Statute of Frauds, inasmuch as it was not to be performed within a year.

The learned judge left it to the jury to say whether, taking the parol evidence and the writing together, it was really agreed that the hiring should be terminable at a week's notice, or was for a year, reserving leave to defendants to move to enter a nonsuit, on the ground that "the writing of the 13th of April, 1871, was conclusive against the plaintiff, and that, the contract being within the Statute of Frauds, extrinsic evidence was not admissible." The jury found that the hiring was for a year, and returned a verdict for the plaintiff, damages 30*l.*

Oppenheim, in Michaelmas Term last, obtained a rule nisi accordingly.

When the case was called on in its order, viz. on the 31st of January, the notes not being in court, and there being no one present to offer an explanation, the rule was discharged. A summons was taken out to stay the proceedings, supported by an affidavit by the managing clerk of the defendants' attorney, which stated that, having obtained the rule nisi, he duly bespoke the judge's notes, and, misled by the note printed at the foot of the rule,—"N.B. A copy of the judge's notes must be bespoken forthwith, and a 5*s.* stamp affixed,"—and being unaware of the fact that the 5*s.* stamp is merely for the "production" of the note-book where the cause is tried before a judge of the court in which the rule is obtained, but that, where the cause is tried before a judge of one of the other courts, a further and additional fee of 6*d.* per folio is payable for "a copy of the notes," he conceived he had done all that was necessary. This summons was heard before Hannen, J., on the 5th instant, when an order was made that "all further proceedings be stayed until the fifth day of next term, such stay to be on payment of 100*l.* into court within a week; all costs thrown away to be paid by the defendants; and, in default, the plaintiff to be at liberty to sign judgment and issue execution." This order was served.

Feb. 9. Upon production of this affidavit, and upon the application of *Oppenheim*, the Court directed the case to be restored to the paper, the defendants paying any costs occasioned by the default; notwithstanding *Joyce* objected that the order of Hannen, J., had been acted upon, and that the plaintiff was content to abide by it.

Joyce shewed cause. The case is not within the Statute of Frauds. The true construction of the memorandum of the 13th of April is, that the hiring is a hiring for one year from that day, but that the payment of salary is to commence from the 19th, and the occupation of the house to be from the same day; or, it may be that the service and salary were to commence on the 13th of April, and the occupation of the house from the 19th. If the period of service was left in doubt upon the face of the memorandum, it was competent to the plaintiff to supplement it by parol.

Oppenheim, in support of the rule. The terms of the hiring can only be gathered from the written contract; oral evidence was not admissible to vary it: *Marshall* v. *Lynn* (1); *Giraud* v. *Richmond.* (2) And there is nothing on the face of the memorandum to shew that it was otherwise than a weekly hiring, at weekly wages: *Rex* v *Newton Toney* (3); *Rex* v. *Dodderhill.* (4)

BYLES, J. Independently of any reference to the Statute of Frauds, the contract declared upon in this case is a written contract clearly defining all the terms of the bargain. It is in terms a weekly hiring and a weekly service at weekly wages; and it cannot be varied by anything which passed at the time by parol, or, as I should think, by anything which might have passed afterwards.

BRETT, J. The agreement being in writing, oral evidence was not admissible to vary it. We must gather the intention of the parties from the writing and the writing only. The rule to be deduced from the cases cited shews that this was a weekly hiring; and the plaintiff should have been nonsuited.

---

(1) 6 M. & W. 109.
(2) 2 C. B. 835.
(3) 2 T. R. 453.
(4) 3 M. & S. 243.

GROVE, J. It would render written agreements useless if conversations which take place at the time could be let in to vary them. The service was to commence from the 19th. On both grounds therefore I agree that the rule should be absolute.

Rule absolute.

Attorney for plaintiff: *H. Parry, Croydon.*
Attorney for defendants: *Joel Emmanuel.*

[REGISTRATION CASES.]*

TOWNSHEND, Appellant;
OVERSEERS OF ST. MARYLEBONE, Respondents.

1871
Nov. 17.

Port 150, - 3, 5, 6
9 CP 250
18 QBD 251
16 QBD 58

Parliament—Borough Vote—Description of Nature of Qualification—"Dwelling-house"—Reform Act, 1832 (2 *Wm.* 4, *c.* 45) *s.* 27—*Representation of the People Act*, 1867 (30 *&* 31 *Vict. c.* 102) *s.* 3.

The qualification of a person on the list of voters for a borough was described as "dwelling-house." The name being objected to, the voter proved such a joint occupation of a dwelling-house as amounted to a qualification in respect of a "house" under the Reform Act (2 Wm. 4, c. 45), ss. 27 & 29. The revising barrister amended the description by striking out the word "dwelling," and retained the name on the list:—

Held (by Willes, Keating, and Collier, JJ.; Brett, J. dissenting), that the revising barrister was right in retaining the name, but that the amendment was unnecessary.

Appeal from the decision of one of the Revising Barristers for the borough of Marylebone.

The appellant duly objected to the name of James Blackman being retained on the list of voters for the borough.

Blackman had occupied jointly with another person the premises in respect of which his name had been inserted by the overseers of the parish in the list. Blackman had so occupied the premises during the twelve calendar months next previous to the last day of July last, had been rated in respect of the premises to all rates for the relief of the poor made during the time of his occupation, had duly paid all the poor-rates and assessed taxes which had become payable from him in respect of such premises previously to the 6th day of April then next preceding, and had resided for six calendar months next previous to the last day of July last within the borough.

The clear yearly value of the premises gave a sum of more than 10*l.* for each occupier.

In the parish of St. Marylebone, the overseers make out only one list of all persons entitled to vote in the election of members for the borough, including in such list as well those entitled to vote in respect of the occupation of premises of the clear yearly value of not less than 10*l*., under 2 Wm. 4, c. 45, as those entitled to vote as inhabitant occupiers, as owners, or tenants of any dwelling-house under the Representation of the People Act, 1867.

---

* For convenience of reference, the Registration Cases for this year are all collected here, irrespective of the Term in which they were decided.

The qualification in respect of which the name of Blackman was inserted in the list was described in the third column as "dwelling-house." The house in fact was originally constructed, and is now used as a shop, with dwelling-rooms above.

It was objected that, inasmuch as the qualification in respect of which the name of Blackman had been inserted in the list was described as a dwelling-house, his title to have his name inserted in such list could only be under the 3rd section of the Representation of the People Act, 1867; and, as it was by that section provided that no man should under the section be entitled to be registered as a voter by reason of his being a joint occupier of any dwelling-house, Blackman was not entitled to have his name inserted in the list.

The revising barrister held that, if the nature of the qualification was insufficiently described, he had power to amend the description of the qualification for the purpose of more accurately defining the same, and did so by substituting "house" for "dwelling-house" as the nature of the qualification; and retained the name of Blackman on the list.

The question for the Court was whether this decision was correct.

Gorst, for the appellant. It must be admitted that before the passing of the Representation of the People Act the word "dwelling-house" would have been a perfectly good description under the Reform Act of the qualification under that Act which the voter in fact possessed. But since the Representation of the People Act the word "dwelling-house" must be read as intended to describe a qualification under that Act. The qualification introduced by the later Act is wholly different from and independent of the qualifications given by the former Act. In one case the premises must be of a certain value, in the other they need not; in the one joint occupation may qualify, in the other it cannot. These two totally different and distinct qualifications cannot both be claimed under the same description. The term "dwelling-house" is the correct and appropriate description of a qualification under the new Act, and would naturally be taken by the objector to point to such a qualification. By s. 59 the two Acts are to be read as one. The term "dwelling-house" is not employed in the old Act; a dwelling-house could only be claimed for as being a "house" under that Act, whereas the word "dwelling-house" is the term used in the 3rd section of the Representation of the People Act.

The respondents did not appear.

WILLES, J. I am of opinion that the revising barrister was right in allowing the franchise in this case. Whether the precise course that he took in making the amendment from "dwelling-house" to "house" was correct, is a different question. It has done no harm, though an amendment in my view of the case was unnecessary. The claimant to a vote in respect of a dwelling-house, in order to make out his claim, would have first of all to shew, and the claimant did here in fact shew, that he occupied a dwelling-house; with that must be coupled the further proof that the occupation of that which was so described as a dwelling-house fell within certain conditions necessary to be fulfilled to give a vote under the provisions of the Act of 1832, in respect of a "house," or within certain conditions to be fulfilled to give a vote under the Act of 1867, in respect of a "dwelling-house."

The Act of 1832 gave a right to vote in respect of a "house, warehouse, counting-house, shop, or other building;" and it is not necessary to look far into the decisions to see that the term "house," as used in that statute, must be treated as a generic term, including the species "dwelling-house" as well as other species of houses. Under that Act, before the passing of the Representation of the People Act, the qualification of a person claiming the franchise might be described as a "dwelling-house." Such a description might be unnecessarily particular, and possibly might restrict the proof to be given to proof of a qualification in respect of a dwelling-house, for otherwise the effect of the description might be to mislead; but the description "dwelling-house" would be the description of a sufficient qualification, for the claim in respect of the species "dwelling-house" would bring it within the genus "house." Further proof would then be necessary of the

1871

TOWNSHEND
v.
ST. MARYLEBONE.

existence of the conditions, the fulfilment of which was required by the statute in order to render the occupation of a house a qualification. If the occupation were joint it would be necessary to prove that the value was sufficient to qualify each of the joint occupiers. In the present case, therefore, irrespective of the Representation of the People Act, there would be a correct description of the nature of the qualification, and the conditions necessary to render the occupation of such a house a good qualification were complied with. Now the Representation of the People Act was passed to enlarge the franchise. Mr. Gorst, however, contends that, whatever the general scope of the Act may be, in the present case it is to have the effect of invalidating a claim to vote, which would have been abundantly sufficient to satisfy the requirements of the former Act. I cannot think that this contention is correct. By the 3rd section of the Act of 1867 the franchise is given in respect of a "dwelling-house" occupied under conditions, the general effect of which is less stringent than those of the Act of 1832, inasmuch as there is no restriction in respect of value. But a restriction is imposed by the section, which does not apply to the occupation of houses, whether dwelling-houses or not, under the Act of 1832. Joint occupiers are not to be entitled to vote in respect of a dwelling-house under the new Act. It is contended that the Act, having given the right to a vote in respect of the occupation of dwelling-houses under these novel conditions, is to be considered as having introduced an entirely distinct franchise, and that therefore the description of the nature of the qualification as "dwelling-house" now necessarily means a claim to the franchise under the Act of 1867 to the exclusion of any claim under the Act of 1832. Mr. Gorst referred to the 59th section of the later Act, which provides that the two Acts shall be read together, and argued that by "dwelling-house" must be meant a dwelling-house as to which the franchise is given under the later Act. It appears to me that this is a fallacy. The fact that the Act of 1867 has given a more extensive right in respect of a dwelling-house than existed under the Act of 1832, seems to be no reason for saying that a claim in respect of a dwelling-house is necessarily to be restricted to a claim in respect of a dwelling-house under the later Act. I do not think we ought to treat the new Act as creating a distinct independent franchise, but as an expansion of the franchise given by the old Act with respect to a dwelling-house occupied under certain conditions. The description of the nature of the qualification as a dwelling-house is still a valid description under the old Act, and if the claimant fails in satisfying the conditions imposed by the new Act he can make out his qualification under the old. I am clearly of opinion that the effect of the Act of 1867 cannot be to take away any right that the claimant to a vote might have had under the Act of 1832.

KEATING, J. I am of the same opinion. The Representation of the People Act leaves untouched the franchises given by the Reform Act. It was conceded—indeed it could not be denied—that under the Reform Act the claimant to a vote might prove, under the description here given, that which the claimant in this case has proved, and thereby would entitle himself to a vote. But it is argued that the effect of the Representation of the People Act is altogether to alter the meaning of the description "dwelling-house," which would before have admitted his right, and to deprive him of such right, because that Act extends the franchise to a dwelling-house occupied under particular circumstances which would not before the Act have conferred the right to a vote. It seems to me that such a result would be very extraordinary. I cannot, however, see any reason for so construing the statutes as to produce this result. The qualification in this case appears to me to have been proved in the terms in which it was described. The voter was the occupier of a dwelling-house under such conditions as to entitle him to the right of voting. The amendment made by the revising barrister was, according to my view of the case, unnecessary, and the name without any such amendment was rightly retained on the list.

BRETT, J. I have the misfortune to differ from the rest of the Court, and, therefore, it is to be assumed that I must be wrong: but still I think the parties are entitled to an expression of my opinion, and I am of opinion that the revising barrister was wrong in retaining the voter's name in this case. The description

1871

TOWNSHEND v. ST. MARYLEBONE.

of the nature of the qualification given was "dwelling-house." Under the Reform Act there were various qualifications in boroughs. By the 27th section the franchise was given in respect of any "house, warehouse, counting-house, shop, or other building." In point of fact, irrespectively of the Act, some of these expressions include others of them. "House," for instance, includes "warehouse." Again, a shop is a house. Yet it was always held under that Act, that though one of these expressions may include others, yet, inasmuch as the Act separates them as descriptions of qualifications, if a person claimed in respect of one he could not prove another in support of his claim, even though such other might be included in the description given. If, for instance, he claimed for a shop, and, though there was a shop in the house, it was proved that he occupied other rooms in the house so as to make his occupation that of a house, that ousted his claim, inasmuch as he ought to have described the subject-matter of his occupation as a house and not as a shop. Now the new Act has given a new qualification in respect of inhabiting a dwelling-house. By the 59th section it is expressly enacted that the new Act shall be construed as one with the enactments for the time being in force relating to the representation of the people and with the Registration Act. By s. 56, "all laws, customs, and enactments now in force conferring any right to vote or otherwise relating to the representation of the people in England and Wales, and the registration of persons entitled to vote, shall remain in full force." It seems to me, therefore, that s. 27 of the Act of 1832 must be read exactly as if "dwelling-house" had been inserted among the other qualifications there mentioned; the section would then run "house, dwelling-house, warehouse, counting-house, &c.," and the description "dwelling-house" must be read as referring to the qualification so inserted in that section. Then, according to the old decisions, the claimant, if he had claimed for a "dwelling-house," could not have proved his qualification as simply "house."

It is argued that this is to take away a right. I do not see how this argument applies. No one doubts the right. The only question is whether the right is properly described with reference to the provisions of the statutes requiring such description. If the qualification proved is a different qualification from that claimed, it is clear revision law that the revising barrister cannot amend by inserting such other qualification. The reason always given for this rule is that otherwise the objector might be misled, and the Court ought to be as careful of the rights of the objector as of the voter. In the present case I think the description is such as would be calculated to mislead the objector. I think he might reasonably suppose that the qualification to vote was claimed in respect of a dwelling-house under the Act of 1867, and finding that the occupancy was joint, would object on that ground. Then, after being misled into starting the inquiry, he comes before the revising barrister, and the objection is held invalid, because the voter then turns round and proves a qualification under the Act of 1832. The objector is by such a description thrown off his guard, and prevented from making the necessary inquiries into the validity of the claim under the old Act.

Collier, J. I am of opinion that no amendment was required in this case, and that the revising barrister was right in retaining the name on the list. It is clear that the claimant was entitled to a vote under the Reform Act, as the occupier of a "house." Is he to be deprived of that right because he has truly described such house as a "dwelling-house"? The term "house" includes "dwelling-house," and though the claimant may by unnecessary particularity have been restricted to proof of a dwelling-house, such a description is the description of a perfectly good qualification under the Act of 1832. But it is argued that the entry describes a particular qualification given by the new Act, of a nature altogether different from that given by the old Act. The answer to that argument seems to me to be this: by s. 56 of the new Act the qualifications thereby given are to be quite independent of those given by the old Act, and to leave the latter wholly untouched. It seems to me that if this was a good description of an existing qualification, irrespectively of the new Act, the claimant cannot be affected by the fact that it also happens to be a good description of a qualification under the new Act. Moreover the qualification given by the new Act is not merely occupation of a dwelling-house; it is the occupation as an inhabitant occupier. If the claimant had described his qualification as being in respect of occupation as

1871

TOWNSHEND v. ST. MARYLEBONE.

inhabitant occupier of a dwelling-house, then there might have been the description of a qualification under the new Act exclusively.

Decision affirmed. (1)

Attorney for appellant: *Aug. Beddall.*

Nov. 18.

FORD, APPELLANT; BOON, RESPONDENT.

Parliament—Borough Vote—Description of Qualification—"House"—Amendment under 6 *Vict. c.* 18, *s.* 40.

Ante 143.
9 CP 250
10 QBD 89.

A claimant, in a borough in which freeholders have the franchise as well as occupiers, in his notice of claim, described his qualification as "house":—

Held, a sufficient description of a qualification as occupier of a house under 2 Wm. 4, c. 45, s. 27.

Held, also, that the revising barrister had power to amend the inaccuracy of description under s. 40 of 6 Vict. c. 18, by adding "occupier of."

APPEAL from the Revising Barrister for the city of Exeter.

Robert Saunders Ganniclifft claimed to have his name inserted in the occupiers' list for the parish of St. David.

Ganniclifft had between the 1st and 25th of August sent to the overseers a notice of claim in the following form:—

"To the overseers of the parish of St. David.

"I hereby give you notice that I claim to have my name inserted in the list made by you of persons entitled to vote in the election of members for the city of Exeter, and that the particulars of my qualification and place of abode are stated in the columns below. Dated the 1st day of August, 1871.

"R. S. Ganniclifft."

In the third column the "nature of qualification" was stated to be "house."

The overseers duly published a list of persons claiming to have their names inserted in the lists, as required by 6 Vict. c. 18, s. 15, in which the names and qualifications of the claimants appeared precisely as they were set forth in their respective notices of claim.

Ganniclifft was on the 31st of July last past entitled to have his name inserted in the list in respect of the occupation of a house of the clear yearly value of not less than 10*l.*

---

(1) See the next case.

Exeter is a city and county of itself, having reserved rights of voting as freeholders and freemen under 2 Wm. 4, c. 45, s. 31; and therefore persons possessing freehold property are entitled to vote for the city; and the overseers of each parish make out two lists, one consisting of persons entitled as occupiers, and the other of persons entitled by virtue of other rights, except as freemen; which lists, after being revised by the barrister, are amalgamated into one list by the town-clerk, forming the register of voters for the city.

The claim having been duly objected to, it was contended on the part of the objector that, though the claimant had followed the form in the schedule prescribed by the Act (1) he had insufficiently filled it up, inserting only the qualification, and not the nature of it also, and that therefore the notice of claim was insufficient; that the word "house" did not express any qualification known to the law; and that there was no indication as to which list Gannicliffit claimed to have his name inserted in, or whether he claimed to be entitled to vote as owner of a freehold house, or as occupier of a house.

It was further contended that the revising barrister had no power to amend the notice of claim under 6 Vict. c. 18, s. 40, by inserting the words "occupation of,"—first, because that would be giving a qualification, and not merely more accurately defining one already given, "house" being no qualification at all,—secondly, because s. 40 only applied to the lists which the revising barrister had to revise, and not to the list of claimants, or any notices; and no alteration of the published list of claimants could enable the barrister to hold that the claimant had duly claimed as required by 6 Vict. c. 18, s. 38, before he could insert his name in the list.

On the part of Gannicliffit it was contended,—1. That the notice of claim, being in the form given by 6 Vict. c. 18, s. 15, was sufficient, although it did not expressly state on which list Gannicliff claimed to be placed: 2. That the nature of Gannicliffit's qualification was sufficiently indicated by the notice of claim: 3. That s. 40 did enable the revising barrister, if necessary, to amend the list of claimants, and that the claim was good; and for this reliance was placed upon the case of *Barlow* v. *Mumford* (1), and the cases therein referred to: 4. That any description of the nature of the qualification in the notice of claim, which, if it had appeared in the overseers' list, the revising barrister should have altered into a correct description, was sufficient; in support of which he relied on *Eaden* v. *Cooper* (2); and that, in an overseers' list, even if "house" were insufficient to designate the qualification, as being ambiguous, and not stating whether it meant "freehold house" or "house as occupier," yet it might be more clearly defined according to the nature of the qualification which it was proved to have been intended to mean, if the information was supplied to the revising barrister.

---

(1) 6 Vict. c. 18, s. 15, sch. B, No. 6.

The revising barrister held,—1. That the form of the notice was sufficient, being that given by the Act, and no one being in fact required to place the claimant's name upon either list till the case came before the revising barrister: 2. That the description of the nature of the qualification in a notice of claim was sufficient, if it was such that the revising barrister should (if it had appeared upon an overseers' list or a register for a county) have amended it, under 6 Vict. c. 18, s. 40, into a correct description; and that "house" was a description which he would have been justified in amending into "occupier of a house," under such circumstances: 3. Though the revising barrister was of opinion that 6 Vict. c. 18, s. 40, did not apply, for the reason relied on by the objector, he held that he was bound by the authority of *Barlow* v. *Mumford* (1) to hold that it did so apply, and that, if he had the power of amendment, he ought to exercise it. He therefore held that the notice of claim was sufficient, and inserted the name of Gannicliffs in the list of occupiers.

The question for the Court was, whether Gannicliffs duly claimed to be placed on the said list,—the revising barrister having made such amendment (if any were necessary) as he had power to do.

Kingdon, Q.C., for the appellant. A notice of claim cannot be amended: *Eaden* v. *Cooper*. (2) The attention of the Court does not seem to have been called to that case in *Barlow* v. *Mumford*. (1)

[BRETT, J. The voter there applied to have his "claim" amended: but what the revising barrister did was to treat the claim as sufficient, and amend the list by inserting the claim with the number of the house in the fourth column.]

---

(1) Law Rep. 2 C. P. 81.

(2) 11 C. B. 18; 21 L. J. (C.P.) 32.

In *Bartlett* v. *Gibbs* (1) the appellant's qualification consisted of the occupation of several houses in succession, and it was described in the list as "house" only; and the Court held that the description of the qualification was insufficient and could not be amended. "As the whole object of the notice," said Tindal, C.J. (2), "would be defeated if the omission of any part of such qualification could be remedied at the court of revision, we are of opinion that the addition of the premises in West Street to the qualification inserted in the list, would have been a change in the description of the qualification not warranted by the provisions of s. 40, and that the revising barrister was right in refusing to make such alteration." So here, the description of the qualification as it stood upon the notice was clearly insufficient; and the addition of the words "occupation of" was a change in the description of the qualification not warranted by the statute. It was, as Mr. Serjt. Manning observes in a note at the end of the report, "a case of *partial omission*, which is unamendable." (2) This principle is sustained by *Daniel* v. *Camplin* (3), where Erle, J., says, "In counties it is not necessary that the voter should be an occupier of the premises in respect of which he is entitled to vote; and the list must therefore state whether he is freeholder, or tenant, or occupier."

[KEATING, J. That is where "house" would not give a qualification.]

There being two species of qualification in Exeter, the claimant must state in respect of which it is that he claims to vote. This argument is not inconsistent with the late decision in *Townshend* v. *St. Marylebone* (4), viz. that a borough voter who claims to be registered in respect of a "dwelling-house" may prove a qualification either for a "house" under s. 27 of the Reform Act (2 Wm. 4, c. 45), or for a "dwelling-house" under s. 3 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102). "Dwelling-house" may well include "house;" but "house" cannot include both a freehold interest and a claim as occupier.

(1) 5 M. & G. 81.

(2) 5 M. & G. at p. 97.

(3) 7 M. & G. 167, 182.

(4) Ante, p. 143.

1871

FORD
v.
BOON.

[WILLES, J. It would do perfectly well in the case of a borough where there are no freeholders.]

No doubt: but it is very different where there is such a complex state of things as here.

[BRETT, J. Would "land" be a sufficient description in the case of a county vote? It might be either freehold, or copyhold, or leasehold.]

There is no hardship in requiring a man to state what his qualification really is. Here an essential part of the qualification is omitted, and cannot be supplied by an amendment. "The distinction which the cases establish is this, that s. 40 of 6 Vict. c. 18 applies only to cases where there has been an inaccurate or insufficient description of the claim relied on, and not to cases where there is a total omission to state some part of the description of the qualification which is an essential foundation of the claim:" per Williams, J., in *Howitt* v. *Stephens.* (1)

Lopes, Q.C., for the respondent, was not called upon; but he referred the Court to *Hitchins* v. *Brown.* (2)

WILLES, J. I am of opinion that the decision of the revising barrister was right. I do not concur with him in the doubts he appears to have entertained as to the decision of this Court in *Barlow* v. *Mumford.* (3) He seems to have come to the conclusion that the Court there held that the "claim" might be amended. It was, however, the list founded upon the notice of claim that was there amended, that is, the list mentioned in s. 40 of 6 Vict. c. 18. In the present case, the revising barrister, acting upon the authority of that case, did amend the list by inserting the qualification as "occupier of house;" and, if it were necessary to determine the matter, I think he was right in so amending "for the purpose of more clearly and accurately defining the qualification," because, if there was any objection to the description as it stood, it appears to me to be an objection to its sufficiency, and that clearly would be amendable under that section.

The substantial objection arises from the circumstance of

---

(1) 5 C. B. (N.S.) 30, 37; 28 L. J. (C.P.) 105. 5 Jur NS 123.

(2) 2 C. B. 25; 15 L. J. (C.P.) 38.

(3) Law Rep. 2 C. P. 81.

Exeter being a city where there are tenures in burgage, as described by Littleton, s. 162, and in which a vote as freeholder or burgage tenant is reserved by s. 31 of the Reform Act, 2 Wm. 4, c. 45; so that a person occupying a house of the yearly value of 10*l.* might have a vote under s. 27 of that Act, or, if the owner of a freehold house of the requisite value, a vote under s. 31. But for the ambiguity thus raised, the claim would appear to be clearly sufficient. In *Hitchins* v. *Brown* (1), the claimant stated his qualification in the third column of the notice to be simply "house;" and it was held a sufficient description of his qualification, which was in respect of houses occupied in succession, and nobody appears to have doubted that "house" would have been a sufficient description of the qualification, had it been in respect of only one house. Indeed, the Court thought it unnecessary for the barrister to amend by altering the third column into "houses occupied in immediate succession," because the original description shewed the nature of the qualification sufficiently. So here, I think we must hold that "house" was a sufficient description. If not, it was clearly amendable under s. 40 of 6 Vict. c. 18; and, the description having been amended, the objection fails.

But, further, after our late decision in *Townshend* v. *St. Marylebone* (2), it must now be taken to be the law, that, if there be a description of a qualification which is sufficient when the claim to vote is in respect of a house of the annual value of 10*l.*, and that description is such as to fall also under some other qualification,—as, for instance, a qualification in respect of a dwelling-house under the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), the person who makes the claim may prove his qualification in respect of the genus "house" under s. 27 of the Reform Act, or in respect of the species "dwelling-house" under the Representation of the People Act, 1867. So I should be disposed to go that length here, and hold that, where a man claims in respect of a "house" in a city or borough where there are freehold voters, he may sustain that claim by shewing either that he occupies a house of the annual value of 10*l.*, or that he has a freehold house of sufficient value. Here, however, the claim was in respect of "house," and the claimant had a qualification as occupier sufficient

---

(1) 2 C. B. 25; 15 L. J. (C.P.) 38.

(2) Ante, p. 143.

1871.

FORD
v.
BOON.

to sustain that claim. Upon these grounds, I think the decision of the revising barrister should be affirmed.

KEATING, J. I also think the decision of the revising barrister was right. The claim is in respect of "house." I do not understand Mr. Kingdon to deny that that would be a perfectly good claim in the case of an ordinary borough: but he says it ceases to be a good claim, because Exeter happens to be a county of a city where freeholders have the franchise as well as occupiers; and we are called upon to say that the revising barrister should have disallowed the claim because the qualification is insufficiently described; or, in other words, we are called upon to say that there is a latent ambiguity in the description of the qualification, and that the claimant ought to have stated whether he claimed as a freeholder or as an occupier. That brings the case within the decision in *Townshend* v. *St. Marylebone* (1), in which we decided that, where the claim was in respect of a "dwelling-house," the claimant was not bound to shew a qualification under the Representation of the People Act, 1867, but might shew his right to be registered in respect of a "house" under s. 27 of the Reform Act. The circumstance of this being a city where persons are entitled to vote in respect of freehold or burgage tenures does not in my opinion make it the less a good description. Under this claim I think the claimant was entitled to shew a qualification in respect of the occupation of a house of the annual value of 10*l.*; and that, if it was necessary for the revising barrister to amend for the purpose of more accurately describing the qualification, he clearly had power to do so under s. 40 of 6 Vict. c. 18. In any view, therefore, the decision was right.

BRETT, J. Upon the first point I entertain no doubt, viz. that the revising barrister had power, under s. 40 of 6 Vict. c. 18, to amend, not the claim, but the description when inserting it in the list. As to the main point, I must confess that, but for the decision of this Court in *Townshend* v. *St. Marylebone* (1), I should have had considerable doubt. The claim is in a borough in which there are qualifications in respect of the occupation of a house, and also in

---

(1) Ante, p. 143.

1871

FORD
v.
BOON.

respect of an ownership of a freehold; and the claimant describes his qualification simply as "house." It was urged by Mr. Kingdon that that description was not merely insufficient, but that it leaves out a material part of the qualification, and throws upon the objector the burthen of preparing himself to meet a claim before the revising barrister which may be put in either of two ways: and in support of his argument he cited passages from the judgments of Erle, J., in *Daniel* v. *Camplin* (1), and of Williams, J., in *Howitt* v. *Stephens.* (2) I must confess I should have thought the objection a very forcible one, but for the case of *Townshend* v. *St. Marylebone.* (3) There the claimant, whose qualification was as joint occupier of a house of the value of more than 20*l.* a year, described his qualification as "dwelling-house." Under that he might clearly have shewn a qualification as an inhabitant occupier under the Representation of the People Act, 1867; and the decision of the Court, as I understand it, was, not that "dwelling-house" did not sufficiently describe the qualification under that Act, but, assuming that it did, it also described a qualification under the old Reform Act, and might therefore be applied to that qualification. That decision negatives the argument of Mr. Kingdon in the present case. I bow with submission to it. The consequence is, that the description of the qualification, which is applicable as well to a claim to vote in respect of the occupation of a house as to a claim in respect of a freehold, is good, and the decision must be affirmed.

COLLIER, J. I agree with the rest of the Court, for the reasons stated. The decision in *Townshend* v. *St. Marylebone* (3) necessarily disposes of this case. We there decided that the description of the qualification was sufficient if it described a good qualification under the old Reform Act, and that the claim did not cease to be a good claim because it also described a good qualification under the Representation of the People Act, 1867. There was not a complete description there of a qualification under the last-mentioned Act; but it was not upon that ground that my opinion was based. If any amendment was necessary (which I do not think),

(1) 7 M. & G. 167, 182.

(2) 5 C. B. (N.S.) 30, 37; 28 L. J. (C.P.) 105.

(3) Ante, p. 143.

5 Jur. N.S. 123.

1871

FORD *v.* BOON.

this was clearly such an inaccuracy of description as was amendable under s. 40 of 6 Vict. c. 18.

Lopes, Q.C., asked for costs.

WILLES, J. The appeal was the result of encouragement by the revising barrister. It is not usual to grant costs in such a case.

Decision affirmed.

Attorney for appellant: *J. Elliott Fox.*

Attorney for respondent: *G. E. Philbrick, for Sanders, Burch, & Barnes, Exeter.*

1872
Feb. 9.

MOGER, APPELLANT; ESCOTT, RESPONDENT.

Parliament—Borough Vote—Houses in Succession—Necessity for being rated—Payment of Rent by Landlord—Representation of the People Act, 1867 (30 *&* 31 *Vict. c.* 102), *ss.* 3, 26—*Reform Act* (2 *&* 3 *Wm.* 4, *c.* 45), *s.* 28.

The claimant to a borough vote had been the inhabitant occupier of two dwelling-houses in immediate succession, each being of the annual value of less than 10*l.*, for the period required by the 3rd and 26th sections of the Representation of the People Act, 1867. He had been rated to, and had paid, all poor-rates made in respect of the first house during his occupation thereof. With respect to the second house, the agreement between himself and his landlord was, that the landlord should pay the rates. A rate was made in respect of the second house during the claimant's occupation thereof, but his name did not appear in the rate; but all rates payable in respect of the premises had been paid by the landlord:—

Held, that the latter part of the 28th section of the Reform Act must, by virtue of the provisions of the 56th and 59th sections of the Representation of the People Act, 1867, be read into s. 26 of that Act; that it was sufficient, therefore with respect to the second house, if the rates had been paid, without the claimant having been rated; that the payment by the landlord was, under the circumstances, a payment by the tenant; and that, consequently, the claimant was entitled to a vote.

APPEAL from one of the Revising Barristers for the city of Bath.

Thomas Moger claimed to have his name inserted in the list of voters.

Thomas Moger's name appeared upon the list of claimants for the parish of St. James, as an occupier of houses in immediate succession from one to the other in the following form:—"Moger, Thomas;" "7, Taylor's Court, Bath;" "Houses in succession;"

"7, Taylor's Court, from 13, Paradise Street, Lyncombe and Widcombe."

Moger up to February, 1871, and for a long time previous, had occupied a house in Paradise Street, for which he paid an annual rent of 6*l.*, and was duly rated to all rates made for the relief of the poor during the time of his occupation, and had paid all rates payable by him in respect of the premises so occupied by him. In the month of February, 1871, he removed direct into and occupied a house in Taylor's Court, for which he agreed to pay an annual rent of 8*l.*, his landlord agreeing, at the same time, to pay the rates. In the month of April, in the same year, a rate was duly made for the relief of the poor of the parish in which Taylor's Court is situate, in which rate the name of Thomas Moger did not appear, nor did he make any claim to have his name placed upon the rate-book, nor were any circumstances shewn which would enable him to avail himself of the benefit of the 19th section of the Poor Rate Assessment and Collection Act, 1869; but all rates payable in respect of the premises occupied by him were, previous to the 20th day of July, 1871, paid by his landlord.

It was contended on behalf of Thomas Moger, that,—since, by the 59th section of the Representation of the People Act, 1867, this Act, so far as is consistent with the tenor thereof, should be construed as one with the enactments for the time being in force relating to the representation of the people, and with the Registration Acts,—in all cases of successive occupation, as referred to in the 26th section of the same Act, although the annual value of the premises occupied be under 10*l.*, the right to be registered depends not upon the occupier having been rated in respect of the premises occupied by him during the time of such occupation, as required by the 3rd section of the same Act, but upon the fact that all poor-rates which shall have become payable from him have actually been paid, as in the case of the successive occupation of houses of the annual value of 10*l.*, under the 28th section of 2 Wm. 4, c. 45.

The revising barrister was of a different opinion, and disallowed the claim of Thomas Moger, on the ground that he had not been rated, had not claimed to be rated, and was not within the operation of the 19th section of the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41).

1871. Nov. 22. *Saunders*, for the appellant. It has been held, under the Reform Act, s. 28, where houses were occupied in succession, that the occupier need not have been rated in respect of the second house, but that it was sufficient if he had paid all rates that had become payable from him: *Rogers* v. *Lewis*. (1) The effect of the 56th and 59th sections of the Representation of the People Act is to import into the Act, with respect to the franchises given by it, all provisions of the Reform Act not inconsistent therewith. The latter part of the 28th section of the Reform Act is therefore applicable to the franchise conferred by the successive occupation of dwelling-houses under s. 26 of the Act of 1867. Secondly, the payment by the landlord was, under the circumstances, equivalent to a payment by the occupier.

Gorst, for the respondent. The latter part of the 28th section of the Reform Act cannot be read into the Representation of the People Act, s. 26. The words of that section are, "as a continued occupation of the same premises in the manner herein provided." The 3rd section is that which confers the franchise in respect of the occupation as an inhabitant of a dwelling-house. One of the incidents of occupation required by that section is the being rated. By the 56th and 59th sections of the Representation of the People Act, the Reform Act is only incorporated so far as it is not inconsistent.

Saunders, in reply.

Cur. adv. vult.

Feb. 9, 1872. The judgment of the Court (Willes, Byles, and Brett, JJ.), was delivered by

BRETT, J. In this case Thomas Moger claimed to have his name inserted in the list of voters for the city and borough of Bath. His name appeared upon the list of claimants as an occupier of a house, 7, Taylor's Court, in immediate succession to his occupation of a house, 13, Paradise Street.

It was proved that the claimant had occupied 13, Paradise Street, for a long time previous to and up to February, 1871, at a rent of 6*l.* per annum, and that he was duly rated to all poor-rates made during the time of such occupation, and had paid all rates payable by him in respect of the premises during such occupation. In February, 1871, the claimant moved direct into and occupied 7, Taylor's Court, for which he agreed to pay an annual rent of 8*l.*, his landlord agreeing to pay the rates. A poor-rate was made in April, 1871, in which the claimant's name did not appear. He did not claim to be rated; he was not entitled to the benefit of s. 19 of the Poor Rate Assessment and Collection Act, 1869; but all rates payable in respect of 7, Taylor's Court, were previous to the 20th of July, 1871, paid by his landlord. The revising barrister disallowed the claim.

---

(1) 7 C. B. (N.S.) 29; 29 L. J. (C.P.) (N.S.) 85. 6 Jur NS 612

It was contended on behalf of the claimant that this decision was erroneous; that it was not necessary that the claimant should be rated in respect of the second house, if he paid all rates payable in respect of it; and that he had by the hand of his landlord paid all such rates. It was contended on behalf of the respondent that, according to ss. 3 and 26 of the Representation of the People Act, 1867, it was necessary, in order to entitle the claimant to be registered, that he should, not only have paid all rates payable in respect of the second house held in immediate succession, but that he should also have been rated to such rates; and, further, that the claimant had not paid in this case the rates payable in respect of the second house.

As to the first point, inasmuch as both houses occupied by the claimant were below the annual value of 10*l.*, the question is whether s. 26 of the Act of 1867 deprives the occupier of a house in immediate succession within the year, and which house is of a less value than 10*l.* a year, of the privilege contained in the proviso to s. 28 of 2 Wm. 4, c. 45, as interpreted in *Rogers* v. *Lewis.* (1) According to that proviso, as interpreted by that case, it is sufficient for such an occupier to have paid all rates due in respect of the second house, though he be not rated in respect of such house, if he has been rated in respect of and has paid all rates due in respect of the first house.

Now, by s. 3 of the Act of 1867, the inhabitant occupier of a dwelling-house, in order to entitle himself to be registered, must have occupied *it*, i.e., the one dwelling-house, for twelve months,

---

(1) 7 C. B. (N.S.) 29; 29 L. J. (C.P.) (N.S.) 85.

1872

MOGER v. ESCOTT.

&c., and must have been rated in respect of *it*, and must have paid all rates payable in respect of it. Sect. 26 deals with one only of these conditions, viz., that of the occupation, and enacts that the occupation of different premises in immediate succession shall have the same effect as a continued occupation of the same premises. There are added the words, "in the manner herein provided." These words might at first sight seem to refer to an occupation accompanied by a being rated and a payment of rates. But these conditions are not the manner of occupation; they are other conditions required to be fulfilled when the claimant has satisfied the condition as to occupation. These words seem to refer to the necessity of a separate, as distinguished from a joint, occupier. Sect. 26, therefore, does not interfere with any obligation or any privilege attaching to the questions of being rated and of the payment of rates. Those obligations and privileges are regulated by other enactments. By ss. 3 and 26, if there were no other enactments applicable, it would seem that the occupier of two houses in immediate succession claiming to be registered by virtue of the qualification contained in the Act of 1867, must have been rated and must have paid the rates in respect of both houses. But by ss. 56 and 59 of the Act of 1867, the proviso in s. 28 of 2 Wm. 4, c. 45, is applicable to the case of houses occupied in immediate succession according to the Act of 1867, unless it be inconsistent with s. 26 of the new Act.

According to the interpretation we have given of s. 26 of the new Act with reference to s. 3 of the same, there is no inconsistency between it and the proviso to s. 28 of the old Act. It follows that the proviso is applicable to the cases of occupation in immediate succession under the new Act; and that, in such cases, the occupier may be registered if he has been rated and has paid all rates in respect of the first house, and has paid all rates payable in respect of the second house, though he has not been rated in respect of it. The reason given in *Rogers* v. *Lewis* (1) for the distinction between the first and second houses is as applicable in the cases of successive occupation under the new as under the old Act.

The second point is, whether the claimant can be said to have paid the rates payable in respect of the second house. He has not

(1) 7 C. B. (N.S.) 29; 29 L. J. (C.P.) (N.S.) 85.

1872

MOGER
v.
ESCOTT.

paid them with his own hand. He has not been released from payment; nor can he be deemed to have paid by virtue of the Poor Rate Assessment and Collection Act, 1869. The question is, whether without recourse to that or any other statute, he can be said to have legally paid the rates. We are of opinion that it can properly be said that he has legally paid the rates. By virtue of the agreement between him and his landlord, the actual payment of the rates by the landlord in this case is a legal payment by the tenant: *Cook* v. *Luckett.* (1)

We are of opinion, in the result, that the claimant was entitled to be registered, and that the decision of the revising barrister was wrong, and must be reversed, and the claimant's name must be inserted in the register.

Decision reversed.

Attorneys for appellant: *Rogerson & Ford.*
Attorneys for respondent: *Mant, Maule, & Robertson.*

BENDLE, APPELLANT; WATSON, RESPONDENT.

1871
Nov. 17.

5 CPD
8 QBD

Parliament — County Vote — Insufficient Local Description of Qualification — Change in Numbers on Houses — Amendment — Registration Act, 1843 (6 *Vict. c.* 18), *s.* 40.

The description of the qualification of a county voter in the third and fourth columns of the register was, "Freehold house and shop," "4, English Street."

At the time when his name was placed on the register, the voter's house was numbered "4." Subsequently, the numbers of the houses were altered by competent local authority; and that house became No. 9, another house in the street becoming No. 4. On objection to the vote:—

Held, that the revising barrister had power under s. 40 of the Registration Act, 1843, to amend the description to "9" from "4," as being an insufficient description of the qualification.

APPEAL from the Revising Barrister for the eastern division of the county of Cumberland.

At the revision of the list of voters for the township of English Street, objection was duly made to the name of John Spiers Baker being retained on the list.

---

(1) 2 C. B. 168; 15 L. J. (C.P.) 78.

1871

BENDLE
v.
WATSON.

The entry in the third and fourth columns of the register was "Freehold house and shop," "4, English Street, Carlisle."

It was proved before the revising barrister that the premises in question were then, and had for six years previously been, numbered 9, English Street. At one time they had been numbered as 4, English Street; but six years before the number had, by competent local authority, been changed from 4 to 9, and had remained 9 since. Baker was proved to have been on the register for the premises in question when numbered 4, and had so remained on the register without objection up to the present time. It was also proved that there were in the same English Street other premises numbered 4, which did not belong to Baker, and in respect of which he did not claim to be entitled to the franchise.

The revising barrister was asked to amend by altering the number in the fourth column from 4 to 9. He decided that Baker had not proved his right to have his name retained upon the list of voters in respect of the qualification described in such list, because the number of the house and shop was wrongly stated to be 4 instead of its proper number 9; and he declined to amend as asked, because he did not consider that he had power to do so, or that he would be right in exercising the power if he had it.

He accordingly expunged the name from the list, subject to the opinion of the Court, whether he had power and ought to ~~be~~ have amended.

J. Sharpe, for the appellant. The revising barrister had power to amend the description of the qualifying property under the 40th section of the Registration Act (6 Vict. c. 18), as being an insufficient description. Such an amendment would not come within the proviso to the section, which forbids such an alteration of the description as would amount to the description of another qualification. In this case the voter retained the qualification in respect of which he was originally inserted in the list, and that was the qualification intended to be described. The description became inaccurate by reason of the action of the local authority in changing the numbers, but it is still the description of the same qualification; the amendment of the number on the list will not, therefore, make the description the description of another qualification than that described. [He cited 6 Vict. c. 18, s. 101; *Nicholls* v. *Bulwer* (1); *Flounders* v. *Donner* (2); *Barlow* v. *Mumford* (3); *Luckett* v. *Knowles.* (4)]

J. H. Fawcett, for the respondent. It was the duty of the party claiming the vote to make a fresh claim when the description on the list became erroneous. *Luckett* v. *Knowles* (4) is not in point, because in that case the error was in the second column, which relates to the place of abode. Here the error was in the description of the qualification, which, by the proviso to the 40th section, is not to be altered, except for the purpose of more clearly and accurately defining the same. This is not an inaccurate description, but an accurate description of the wrong house. The amendment would therefore clearly be a change of the description within the proviso, and not within the exception to it, for it would be the substitution of a description of something altogether different, not a more accurate definition of the same thing: see *Flounders* v. *Donner* (2); *Bartlett* v. *Gibbs* (5); *Onions* v. *Bowdler.* (6)

[BRETT, J. *Bartlett* v. *Gibbs* (5) and *Onions* v. *Bowdler* (6) were decided on the ground that the description of the nature of the qualification was different from that sought to be proved. The qualification being really in respect of houses occupied in succession, the description on the list pointed only to occupation of a single house.]

[He also cited *Hitchins* v. *Brown* (7).]

J. Sharpe was not called upon to reply.

WILLES, J. The question raised in this case depends upon the 40th section of the Registration Act (6 Vict. c. 18). This section enacts that "if any person whose name is included in any such list, or his place of abode, or the nature or description of his qualification," meaning thereby of the qualification which the individual really has, "shall in the judgment of the revising barrister be insufficiently described for the purpose of being identified," the revising barrister shall expunge the name, unless the matter insufficiently described be supplied to the satisfaction of such barrister, in which case he shall insert the same in the list. So far as the wording of this part of the section goes, the "place of abode" and the "nature and description of the qualification," being the one in the third, and the other in the fourth column, stand on the same footing. It has been decided in the case of *Luckett* v. *Knowles* (1) that where the place of abode was intelligibly described, and such description represented a place really existing, not the place of abode of the individual, the description might be amended to that of an abode altogether different, but which was the real abode. It follows, from that decision, that the words "insufficiently described," which, applied to the place of abode, were held to include a description both erroneous and insufficient, must apply in the same sense to the description of the qualification. If the description be erroneous only, that is to say, a description of a qualification entirely different from the real qualification, the case falls within the decisions relied on by Mr. Fawcett, as being within the subsequent proviso in the section, which provides that "whether any person shall be objected to or not, no evidence shall be given of any other qualification than that which is described in the list of voters or claim, as the case may be, nor shall the barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same." A distinction is drawn by this proviso between the qualification and the description of it and the place of abode. Such being the provisions of the section, it is necessary to see, first, whether this is the case of an insufficient description of the qualification, and if so, secondly, whether it falls within the proviso or the exception to it. With reference to the first of these questions take this illustration:—Suppose there is a house in a street numbered 4, but which is described as No. 40, and the person who owns the house and is entitled to a vote in respect of it, is objected to on this ground, and comes before the barrister to defend his vote, and it is then proved that there is no No. 40 in the street, it is clear that in such case No. 40 is not a true description of any existing thing, it is an insufficient description of the real number of the house in the street; and the case is really the same as if no number had been inserted, when it would seem that under the section there could be an amendment. But suppose that after such description had been given a No. 40 had come into existence in the street, and so the description had become erroneous, would that take away the power of amendment? Surely not; the description would still be an insufficient description of an existing thing. Such considerations as these seem to have governed the decision in the case of *Luckett* v. *Knowles.* (1) In that case two of the judges appear to have been rather in favour of applying the early part of the section, which gives the power to correct any mistake, though I do not see how that can apply, inasmuch as there is no mistake made by any one in making out the list. All the judges, however, thought that the case was clearly one of an insufficient description. The effect of the description being insufficient was held not to be defeated by its being also erroneous, and the result was that the correction of an altogether wrong name in the case of the place of abode was held to be within the power of amendment given by the section. Here no one can suppose that the name of the voter was struck off because he claimed a right in respect of the existing No. 4. His intention was to claim a right to be on the register in respect of the former No. 4. It should, therefore, seem that his qualification was insufficiently described within the meaning of the section.

---

(1) Law Rep. 6 C. P. 281.

(2) 2 C. B. 63; 15 L. J. (C.P.) 81.

(3) Law Rep. 2 C. P. 81.

(4) 2 C. B. 187; 15 L. J. (C.P.) 87.

(5) 5 M. & G. 81.

(6) 5 C. B. 65; 17 L.J. (C.P.) 70.

(7) 2 C. B. 25; 15 L. J. (C.P.) 38.

---

(1) 2 C. B. 187; 15 L. J. (C.P.) 87.

Then the question arises whether this case comes within the proviso. Was this " any other qualification " within that proviso? I think, reading the proviso by the light of the meaning before given to the words " his qualification," viz., as referring to the qualification that the party really possesses, it was not. To a person who had left the place while the house was still numbered 4, and had returned without being made aware of the change, No. 4 would still be the description of the actual qualification. It is impossible to affirm, therefore, that this is necessarily the description of another qualification. All that has happened is that the former description has become insufficient by reason of the change. If the description be insufficient, it follows that the qualification cannot be different. It is a description taken from an old description true at the time, and is not intended to represent another qualification. Then, with respect to the second part of the proviso, which provides that there shall be no change of the description of the qualification, except for the purpose of more clearly and accurately defining the same, similar reasoning applies; the description given is a true description to a person who knew the house before the change of numbers—false to a person who did not. Reading the expression " his qualification," in the beginning of the section, as meaning his actual qualification, the effect of the proviso is clear. The qualification here described was actually the same qualification as that in respect of which the party was entitled to the franchise, and the description was true to a certain extent, inasmuch as the house in question was the former No. 4.

---

(1) 2 C. B. 187; 15 L. J. (C.P.) 87.

Under these circumstances, I think the revising barrister ought to have amended. The cases cited by Mr. Fawcett, do not appear to be really applicable to the present question. The cases of *Bartlett* v. *Gibbs* (1) and *Onions* v. *Bowdler* (2) must be taken in connection with the decisions in *Flounders* v. *Donner* (3) and *Hitchins* v. *Brown*. (4) In *Flounders* v. *Donner* (3), Erle, J., seems to have been of opinion that if the number had been supplied, the barrister would have been bound to amend. Both the cases of *Bartlett* v. *Gibbs* (1) and *Onions* v. *Bowdler* (2) are cases in which the character of the qualification would have been changed by the amendment; because the claim was in respect of the occupation of one house, whereas the real qualification was in respect of successive occupation of two houses; in the one case there was no reference at all to the first house; in the other, no reference to the second. The real qualification was totally different from that described. If we could see here that there was an attempt to introduce a qualification other than that intended to be described by the language used on the register, the case would be different, and I should say that there ought not to be an amendment. There is nothing of the kind; it therefore seems to me that this was the case of an insufficient description of the qualification which the person claiming really possessed, and that the revising barrister should have amended.

KEATING, J. I am of the same opinion. The object of the

(1) 5 M. & G. 81.

(2) 5 C. B. 65; 17 L. J. (C.P.) 70.

(3) 2 C.B. 63; 15 L. J. (C.P.) 81.

(4) 2 C. B. 25; 15 L. J. (C.P.) 38.

legislature, as it is to be gathered from the terms in which they have entrusted the power of amendment to the revising barrister, is that a person should not be allowed to be upon the list in respect of a qualification other than that in respect of which he was intended to be inserted. Where the description in question is that of the nature of the qualification, the party on appearing cannot claim to be on the list in respect of a qualification of a different nature. I think the description of the qualification, by which it appears to me is meant the fourth column, may be altered under the section, if it be shewn that by the proposed alteration the subject-matter and nature of the qualification intended to be inserted will be left the same. It must be remembered in determining this question that, though six years had elapsed in this case since the change of name, the same point would arise, if at any period previous to the July preceding the revision the same change had been made in the numbers. This change was made by a competent authority independent of those concerned; and it appears to me under these circumstances, if the words of the section are susceptible of a construction which will give the power of amendment, we ought to give them such a construction. The case of *Luckett* v. *Knowles* (1) is an authority in favour of such a construction. There are only these differences between that case and the present: that was the case of a borough vote, and the question arose with respect to the description of the place of abode; here, the question arises with respect to a county vote and the description of the qualification in the fourth column. These differences, however, do not seem to be essential; the principle established is that not only a total omission may be supplied, but that an erroneous description, one contrary to the fact, may be changed to another description under the powers of amendment given by the section. The difficulty which chiefly struck me was, that such an alteration as this might come within the words of the proviso to the section which prevents evidence being given of any other qualification than that described, and any change of the description of the qualification as it appears on the list, except for the purpose of more clearly and accurately defining the same. I think, however, that this proviso is sufficiently satisfied by interpreting

---

(1) 2 C. B. 187; 15 L. J. (C.P.) 87.

1871

BENDLE
v.
WATSON.

it to refer to the description of the nature of the qualification, and to mean that there shall be no change of that description such as to make the qualification on the register different from that intended to be inserted. I think that this was therefore an error that might and ought to have been amended.

BRETT, J. This is a case of considerable difficulty; but, on the whole, I am of opinion that there was power to amend, and that the amendment ought to have been made. The point of time to which the attention must be directed is that at which the parties were before the revising barrister. The third and fourth columns, taken together, in one sense form the description of the qualification. The third column describes its nature, and the fourth column is descriptive of its subject-matter. At the point of time referred to there was, therefore, an inaccuracy in the description. This is not such an inaccuracy as to fall within the 101st section of the Act, for it was so great that the house could not be said to be so denominated as to be commonly understood. If it had come within that section, no amendment would have been necessary at all. The question therefore arises whether it is an inaccuracy such as there is power to amend. The only power of amendment is given by the 40th section; unless, therefore, the case can be brought within the words of that section, there is no power of amending. This is not a mistake within the earlier part of the section. I take it that what is meant by mistake there must be a mistake by the overseers. Here there is no such mistake. The overseers had no power to alter the list by changing the 4 to 9. No person, other than the revising barrister, could have such power. The question, therefore, is, whether, under the subsequent part of the section, he can amend. Now, the view I take of the section is this: if the inaccuracy is such as to make the description of the qualification the description of another qualification than that which is to be proved, the evidence cannot be given which would be sufficient to enable the amendment to be made; but if the description be merely an insufficient description of that which is to be proved, then I think there can be an amendment, because the qualification described is the one which is proved. I think this is clear from an examination of the section: the earlier part is said to apply only to cases where there is no objection, but I think that it applies both to cases where there is and where there is not. The section says that the revising barrister shall strike out the name in the absence of the required evidence when the name or place of abode, or nature or description of the qualification, shall be insufficiently described for the purpose of being identified; but if the requisite evidence to set the description right be forthcoming, then he may amend it, provided that the case does not come within the proviso. The section is, no doubt, intricately drawn, because the proviso has an exception engrafted upon it. Now the words of the proviso are, "nor shall the barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same." There may be cases in which he may change the description, but they can only be cases within this exception. The whole effect comes to this: If the description be so inaccurate as that if the change be made the description becomes one of a different qualification, it cannot be said that the change is merely for the purpose of more clearly and accurately defining the same; but if the description be merely an insufficient description of a qualification which, after the change of description, remains the same qualification, then the amendment may be made. The whole question, therefore, seems to resolve itself into the question whether this is a case of an insufficient description. I should have had very great doubts as to this, but for the decision in *Luckett* v. *Knowles.* (1) It was argued that the description was not only insufficient, but erroneous; that is to say, it was not only an insufficient description of the thing intended, but a description of something else. The same argument was employed in the case of *Luckett* v. *Knowles.* (1) It is true that the decision in that case related to the description of the place of abode, but on looking at the section it will be seen that insufficient description of the place of abode is collocated with insufficient description of the qualification. The same rule therefore, it would seem, must apply to both cases. Tindal, C.J., there held that the description of a wrong place might be held to be an insufficient description of the right place. Taking that to be a governing authority with relation to the meaning of the statute, I must apply

(1) 2 C. B. 187; 15 L. J. (C.P.) 87.

1871

BENDLE v. WATSON.

the same reasoning to the case of the description of the qualification, and hold that the description of the qualification is not in this case so erroneous as to amount to the description of another qualification than that to be proved, but merely an insufficient description; and that, therefore, the amendment should have been made in this case.

COLLIER, J. I am of the same opinion. I am disposed to think that the first part of the section applies, and that this was a mistake which might have been corrected under the power thereby given, but it is not necessary to insist on this view, as I agree with the rest of the Court in thinking that the case comes under the subsequent part of the section. The question is whether the description here comes within the words "insufficiently described." It is urged that the description here was not insufficient, but positively erroneous. It does not cease to be insufficient because it is erroneous; it may be both. Then it is urged that the proviso to the section applies to the case. It does not seem to me that the evidence to be given would be evidence of another qualification, but of the same qualification, as to which there was no real doubt, but the description of which, by reason of the change of the numbers in the street, had become insufficient.

Decision reversed.

Attorneys for appellant: *Carter & Bell, for Bendle, Carlisle.*
Attorneys for respondent: *Grey, Johnston, & Mounsey.*

Nov. 18.

FIRTH, APPELLANT; THE OVERSEERS OF WIDDICOMBE-IN-THE-MOOR, RESPONDENTS.

Parliament—County Vote—Notice of Claim in Respect of a 12l. Occupation—6 Vict. c. 18, s. 15, Sch. B. No. 6—31 & 32 Vict. c. 58, s. 17.

A 12*l.* occupier served upon the overseers on the 25th of August a notice of claim in the form given in 6 Vict. c. 18, sch. A. No. 2,—"I claim to be inserted on the list of voters for the division of East Devonshire;" and in the third column the "nature of qualification" was stated to be "Land as occupier:"—

Held, a good notice, as a sufficient compliance with 31 & 32 Vict. c. 58, s. 17, and 6 Vict. c. 18, s. 15.

APPEAL from the Revising Barrister for the eastern division of the county of Devon.

Frederick Hand Firth claimed to have his name inserted in the list of 12*l.* occupiers for the parish of Widdicombe-in-the-Moor.

It was proved that Firth had on the 25th of August, 1871, sent to the overseers of the parish a notice of claim, as follows:—

"To the overseers of the parish of Widdicombe-in-the-Moor.

"I hereby give you notice that I claim to be inserted in the list of voters for the division of East Devonshire, and that the particulars of my place of abode and qualification are stated in the columns below.

"Dated the 25th of August, 1871. (Signed) F. H. Firth."

In the third column the "nature of qualification" was stated to be, "Land as occupier."

It was proved that Firth was entitled, on the 31st of July last past, to have his name inserted in the list in respect of the qualification described in the notice of claim, and that the land occupied by him was of the value of more than 50*l.* a year.

There was no evidence that any list of persons claiming to have their names inserted in the list of 12*l.* occupiers had been published by the overseers.

It was contended by the objector that the notice was insufficient, because it did not shew in what list Firth claimed to have his name inserted.

It was contended by Firth that the notice was to "the like effect" as the form of notice given by 6 Vict. c. 18, sched. B., No. 6; and that the date at which the notice was sent to the overseers sufficiently indicated the list in which he desired his name to be inserted.

The revising barrister held that, the legislature having by 6 Vict. c. 18, s. 4, appointed a form in which persons should claim to be placed on the register of voters for a county, and, by 31 & 32 Vict. c. 58, s. 17, taken in conjunction with 6 Vict. c. 18, s. 15, having expressly appointed a different form in which persons should claim to be placed on the list of 12*l.* occupiers, the first form was not applicable to a claim to be placed on the list of 12*l.* occupiers; but that a notice of claim to be placed on such list should shew on its face that it was a claim to be placed on that list, and not a claim to be placed on the register, sent in too late. He therefore refused to insert the name of Firth in the list.

1871

FIRTH
v.
WIDDICOMBE.

The question for the Court was, whether the notice of claim was sufficient.

G. Lewis, for the appellant. The claimant sent in his notice of claim on the 25th of August, which was the last day for claiming to be on the list of 12*l.* occupiers, and considerably too late for a claim in respect of any other description of qualification, the latest day for which latter would be the 20th of July. His claim, therefore, could only be a claim to be on the list of 12*l.* occupiers. *Lambert* v. *Overseers of St. Thomas, New Sarum* (1) is in point. The 17th section of the Registration Act, 1868 (31 & 32 Vict. c. 58), refers to s. 15 of 6 Vict. c. 18, and requires the notice of claim in respect of a 12*l.* occupation in counties, to be as in boroughs, the form of which is given in schedule B. No. 6: (2) the notice in this case is substantially, if not strictly, in compliance with that direction. And see Rogers on Elections, 11th ed. pp. 129, 141.

The respondents did not appear.

WILLES, J. I am of opinion that the notice of claim is not open to the objection raised against it in this case, and that the decision of the revising barrister was erroneous. That decision seems to be founded upon the notion that a person entitled as a 12*l.* occupier who sends in a claim at a period when he can be claiming as a 12*l.* occupier only, and who describes his qualification in the third column as "Land as occupier," fails to give a sufficient notice that he claims to be put upon the list of 12*l.* occupiers, under the Representation of the People Act, 1867. Having carefully searched through the statutes, I am unable to find anything beyond the reference in s. 17 of 31 & 32 Vict. c. 58, to s. 15 of the Registration Act (6 Vict. c. 18), which calls upon the claimant to describe to the overseers the particular list in which he claims to have his name inserted. If the Act had contained any such requirement, seeing that at the time the notice in this case was given there was only one list upon which the claimant's name could be put, the notice must be assumed to have meant that list. But I do not rest my judgment upon that. I think the Act of Parliament is not to be read as imposing a duty upon the voter to state the particular list upon which he requires his name to be placed. Under the Representation of the People Act, 1867, and the Registration Act, 1868, the overseers have a special duty imposed upon them with regard to the list of 12*l.* occupiers in counties; and by s. 17 reference is made to s. 15 of the Registration Act of 1843, which relates to claims in boroughs. Two notices of claim are there mentioned, the one in respect of the occupation of property, the other in respect of a claim to vote as a freeman. The claimant here has not strictly followed the former, but it seems to me to be a sufficient compliance with the Act. We are left somewhat at large; but I cannot help thinking that this notice gives in substance all that is required. It throws no difficulty either upon the overseers or upon the revising barrister. The decision must be reversed.

---

(1) 12 C. B. 642; 22 L.J. (C.P.) 31.

(2) 31 & 32 Vict. c. 58, s. 17, after reciting s. 30 of 30 & 31 Vict. c. 102, and s. 15 of 6 Vict. c. 18, enacts "that the said 15th section of the principal Act (6 Vict. c. 18) shall apply to the list of persons on whom a right to vote for a county in respect of the occupation of premises is conferred by the Representation of the People Act, 1867, in the same manner as if the list of voters in the said 15th section referred to were the list of voters made in pursuance of the enactment contained in the 30th section of the Representation of the People Act, instead of the list of voters for a city or borough as specified in the said 15th section."

UdC 17 Jun 3.

KEATING, J. I am of the same opinion. It is the duty of the overseers in a borough to make out the lists; and persons whose names are omitted therefrom have a right to make claims to be inserted therein, if duly qualified. As to counties, it was different: all parties entitled had to make a claim in the first instance. Then came the Representation of the People Act, 1867, giving a new qualification for counties, viz. in respect of the occupation of property of the rateable value of 12*l.*; and a new duty was cast upon the overseers to make out lists of voters in respect of the new franchise, as they had formerly done in boroughs only. Then the Registration Act of 1868 provides that a person whose name is omitted from the county list may claim as in a borough, as nearly as the circumstances will admit of. Now, in boroughs, by the form given in schedule B to 6 Vict. c. 18, a claimant could only claim as occupier or as a freeman. He was not bound to state in his notice that he claimed as occupier, because the absence of a claim to vote as a freeman shewed that he claimed as

1871

FIRTH v. WIDDICOMBE.

occupier. The form applicable to occupiers is merely, "I claim to have my name inserted in the list of persons entitled to vote," &c.; but, where the party claims as a freeman, the form is, "I claim to have my name inserted in the list of persons entitled *as freemen* to vote," &c. The revising barrister seems to have thought that 31 & 32 Vict. c. 58, s. 17, taken in conjunction with s. 15 of 6 Vict. c. 18, required the notice of claim in respect of a 12*l*. occupation to shew upon the face of it that it was a claim to be placed upon the list of 12*l*. occupiers. I have looked through the Act to see whether there was any provision which cast upon the claimant the duty of stating in his claim that he claims as a 12*l*. occupier; but I find none. The decision of the revising barrister must therefore be reversed.

BRETT, J. The objection taken before the revising barrister was that the notice of claim was insufficient, because it did not shew in what list the party claimed to have his name inserted; and his decision raises this question, whether, the qualification being sufficiently stated, it is necessary for the claimant to state in his notice the list he claims to be on. In counties, claims to be inserted in the list were to be in the form given in the schedule A. No. 2. In boroughs, it was the duty of the overseers to make out a list of all persons entitled to vote; and, if any person was omitted from such list, he had to send in to the overseers a claim in the form given in the schedule B. No. 6, or to the town-clerk a claim in the form No. 7. After the passing of the Registration of the People Act, 1867, by which the occupation franchise was first introduced into counties, the list of such voters is to be regulated according to the mode before in use as to boroughs; and according to that the overseers are bound to make out a list of persons entitled to vote as 12*l*. occupiers: and, if any person is omitted from such list, he is to claim in the same way as a person omitted from a borough list was to claim. The claimant is by s. 17 of 31 & 32 Vict. c. 58, to claim, as pointed out by s. 15 of 6 Vict. c. 18, that must be either according to the form No. 6 or No. 7 in schedule B. of 6 Vict. c. 18. The form No. 7 is applicable only to persons claiming to vote as freemen. The form to be adopted here, therefore, must of necessity be that numbered 6; and that has been substantially followed. The revising barrister comes to the conclusion that the claim is to be according to form No. 6, but then he goes on to say that a notice of claim to be placed on the list of 12*l.* occupiers "should shew *on its face* that it was a claim to be placed *on that list.*" I see no such obligation imposed by the Act; and therefore I think the conclusion he has arrived at is erroneous.

COLLIER, J. The notice of claim is substantially in accordance with the form No. 6 in sched. B. of 6 Vict. c. 18, which is the only form that can apply to the case. I therefore agree with the rest of the Court that the decision of the revising barrister must be reversed.

Decision reversed. (1)

Attorneys for appellant: *Coode, Kingdon, & Cotton, for John Daw & Son, Exeter.*

(1) The form given for a claim to the old county franchises, under 6 Vict. c. 18, s. 4, sched. A, No. 2, is, "I claim to be inserted in the list of voters for the county of ——," the precise words used by the present claimant; whereas the form given under s. 15, sched. B, No. 6 (which, by 31 & 32 Vict. c. 58, s. 17, is the form to be used by a claimant to the 12*l.* occupation franchise), is, "I claim to have my name inserted in the list *made by you* of persons entitled to vote in the election of members for the city (or borough) of ——." The decision of the revising barrister appears to have been that the notice, being in the first form, was not in the other form or to the like effect, and was therefore not sufficient. It may be observed, that if the words "made by you" had been inserted the notice would have pointed directly to the list of 12*l.* occupiers, as that list is the only one made out by the overseers.

1871
Nov. 18.

CHORLTON, Appellant; THE OVERSEERS OF TONGE, Respondents.

Parliament—County Vote—Notice of Objection—Description of Objector—Parish in Two Polling Districts, under 31 & 32 *Vict. c.* 58, *s.* 22.

By s. 22 of the Registration Act, 1868 (31 & 32 Vict. c. 58), "where any parish in a county, city, or borough forms part of more than one polling district, the part of such parish situate in each polling district shall be deemed to be a separate parish for the purpose of the revision of voters and the lists and register of votes."

The township of S. was separated into two polling districts, and the overseers prepared separate lists for each district under the above section. In a notice of objection, sent to a county voter, the objector described himself as "on the register of voters for the township of S." :—

Held, that the notice was sufficient, and need not specify on which of the two lists his name appeared.

Appeal from the Revising Barrister for the south-eastern division of the county of Lancaster.

Samuel Stott objected to the name of Enoch Beswick. In the notice of objection sent to Beswick Stott was described as "On the register of voters for the township of Spotland."

The township of Spotland consists of the hamlets of Brandwood Higher End, Brandwood Lower End, Whitworth Higher End, Catley Lane, Chadwick, Clay Lane, Palinge, Henley, Whitworth Lower End, Wolstenholme, and Woodhouse Lane.

The first three of these hamlets constituted the whole of the Brandwood Higher End polling district in the year 1871 and last year. The other hamlets within the township of Spotland form part of the Rochdale polling district.

The overseers of the township of Spotland prepare the lists of voters of the whole township of Spotland; and they published during the year 1871, within the Brandwood Higher End polling district, the names of all voters whose qualification was situate within such polling district; and they published during the present year, within the Rochdale polling district, the names of all voters whose qualification was situate within such part of the township of Spotland as was within such polling district. Thus, they published during the year 1871, within the Brandwood Higher End polling district, a document headed as follows:—

"Brandwood Higher End Polling District.

"The register of persons entitled to vote at any election of a member or members of parliament for the division of south-east Lancashire, between the 31st day of December, 1870, and the first day of January, 1872:—

"Hamlets of Brandwood Higher End, Brandwood Lower End, and Whitworth Higher End, in the township of Spotland."

And the overseers also published, within such part of the township of Spotland as lies in the Rochdale polling district, a document headed as follows:—

"Rochdale Polling District.

"The register of persons entitled to vote at any election of a member or members of parliament for the division of south-east Lancashire, between the 31st of December, 1870, and the 1st day January, 1872:—

"The hamlets of Catley Lane, Chadwick, Clay Lane, Palinge, Henley, Whitworth Lower End, Wolstenholme, and Woodhouse Lane, in the township of Spotland."

The name of the objector appeared only on the last-mentioned register of persons entitled to vote.

It was contended on behalf of Beswick, the person objected to, that the notice of objection was invalid on the following grounds: 1. That there was no list of voters described or distinguished by the name of "the register of voters for the township of Spotland:" 2. That the list of voters whose qualifications were in the township of Spotland were divided into two parts, one part consisting of the three townships constituting the Brandwood Higher End polling district, and the other part consisting of the eight townships constituting the Rochdale polling district: 3. That the objector should have described the particular list of voters on which his name appeared, and not have given the name of a township which formed part of two polling districts and had two separate and distinct sets of lists.

The revising barrister considered that, if the notice of objection was according to the form No. 5 in schedule A. of 6 Vict. c. 18, or to the like effect, as required by sect. 7 of the Act, it was good; and, seeing that the only difference between the notice of objection and the form was, that in the notice it was "on the register of voters for the *township* of Spotland," and in the form the words are, "on the register of voters for the *parish* of ——," he considered that the notice of objection was, under the circumstances of this case to the like effect as the form, and that it was not necessary to specify the particular list of voters, as was contended. He therefore decided that the notice of objection was valid, and struck the name of Beswick from the list of voters.

If the Court should be of opinion that the notice of objection was invalid, the names of Beswick and nine other persons whose cases were consolidated were to be restored to the respective lists.

John Edwards, for the appellant. The notice of objection is bad. The objector was bound to shew upon what list his name appears. He has not done this; for, there is no such list as "the register of voters for the township of Spotland." He should have described himself as on the register for "the Rochdale polling district of the township of Spotland." The county justices have power under s. 34 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), to divide the county into polling districts; and by s. 22 of the Registration Act, 1868 (31 & 32 Vict. c. 58), it is enacted that, "where any parish in a county, city, or borough forms part of more than one polling district, the part of such parish situate in each polling district shall be deemed to be a separate parish for the purposes of the revision of voters and the lists and register of voters, and may be designated by some distinguishing addition in the list of voters for such part of a parish." "Parish" and "township" are synonymous with reference to registration, and that provision, therefore, expressly applies to this case, and by necessary implication repeals the provisions as to notices of objection in 6 Vict. c. 18, and 28 & 29 Vict. c. 36.

[Brett, J. But for s. 22 of 31 & 32 Vict. c. 58, the notice here, which is in the form provided by 28 Vict. c. 36, s. 6, sched. A., No. 2, would clearly be good.]

No doubt it would. But that section for this purpose makes the polling district a parish. In practice these districts are treated as separate. The lists are to be designated by some distinguishing addition, as has been done in the present case, and the objector might have added this as the name of his parish.

In *Eidsforth* v. *Farrer* (1) the objector was described as "on the list of voters for the borough of L." The register of voters for L. consisted of four separate lists, one of 10*l.* householders for each of three townships comprised in it, and one of the freemen of the borough. It was held that the notice was insufficient.

[BRETT, J. How do you construe the words in s. 22, "for the purposes of the revision of voters?"]

As extending to every step in the course of registration. The Registration Acts are to be construed in pari materiâ.

[BRETT, J. If you are right, it must extend to a notice of claim. How is notice of a claim to be given to "the overseers of a polling district?"]

The notice is given to the overseers of the parish. If there be separate polling districts it is the duty of the overseers to make out the lists separately: see 31 & 32 Vict. c. 58, s. 6, subs. 6. In *Allen* v. *Geddes* (2) the notice was held sufficient because it was found that the person objected to could not have been misled.

The respondents did not appear.

WILLES, J. I incline to think that the decision of the revising barrister was right, and that the notice of objection was valid. We start with this, that the notice follows the form given in the Act. The right to object was given by 6 Vict. c. 18, s. 7, and the notice was to be in the form given in sched. A., No. 5, or to the like effect. The form substituted in some cases by 28 Vict. c. 36, s. 6, in sched. A., No. 2, is identical for this purpose; and that form has been followed here, reading "township" for "parish." The next proposition is equally clear, viz. that there is no subsequent Act repealing that provision in 28 Vict. c. 36. Mr. Edwards attempted to shew that it was virtually repealed by 31 & 32 Vict. c. 58, creating new polling districts, and that by force of s. 22 of that Act the township of Spotland is for this purpose abolished and gone, and that the objector should have described himself as on the list of one of the polling districts into which Spotland had been divided. In order to lead up to that argument, it was necessary to refer to the provisions of the several Acts relating to polling districts. Mr. Edwards starts with s. 34 of 30 & 31 Vict. c. 102. But I apprehend that, in order to obtain a consistent view of the law, it is necessary to go back to the provisions of the first Reform Act, 2 Wm. 4, c. 45. It is somewhat remarkable that, though it should seem to have been intended that polling districts would be conterminous with parishes, there is nothing to lead one to the conclusion that they necessarily were so. In the notice of objection to the person objected to, though not in that to overseers, the party objecting was to state the parish in the list of which his name appeared. There the ecclesiastical division is adopted; but it is not so in the case of the division of counties into polling districts. The first provision for the division of counties into polling districts is in s. 63 of 2 Wm. 4, c. 45, such districts to be settled and appointed by 2 & 3 Wm. 4, c. 64. We know that by 31 & 32 Vict. c. 122, s. 27, extra-parochial places are to be reckoned part of the next adjoining parish with which it has the longest common boundary. And there is nothing to render it legally impossible to have one part of a parish in one polling district and another part in another polling district, under 30 & 31 Vict. c. 102, s. 34, which enables justices to make provision for increased polling districts. It might have been more convenient if claims and objections were made with reference to these divisions of counties, but there is no legislative provision to be found to that effect. By s. 6, subs. 6 of 31 & 32 Vict. c. 58, provision is made for the printing of the lists, so that they shall be capable of forming one book, or of being detached each list by itself, so that the list of any parish or township, or all the lists of any polling district or polling districts, may be had separately; so that there is no difficulty in getting at any particular list and finding out on which the objector's name appears. We now come to s. 22, upon which Mr. Edwards's argument is mainly founded. It enacts that "where any parish in a county, city, or borough forms part of more than one polling district, the part of such parish situate in each polling district shall be deemed to be a separate parish for the purposes of the revision of voters and the lists and register of voters, and may be designated by some distinguishing addition in the list of voters for such part of a parish." Is that a repeal by necessary or even reasonable inference of the provisions as to claims and objections in 6 Vict. c. 18, and 28 Vict. c. 36? I apprehend not. There is no reason why those provisions should be repealed. It is enough to say that the words "revision of voters" are satisfied by holding them to be confined to what is done by the revising barrister, and the preparations for that revision by the officer who is to prepare the lists for that purpose. The claimant is not a revisor; he simply, by making a claim, gives himself a right to intervene at the revision to sustain his claim. The objector is not a revisor; he simply, by making an objection, acquires a right to assist in the operation of revision by the barrister. I see no reason, therefore, for holding s. 22 to have repealed the former Acts as to claims and objections; and I see great inconvenience which might result from any change of the forms provided by them.

---

(1) 4 C. B. 9; 16 L. J. (C.P.) 132.

(2) Law Rep. 5 C. P. 291.

KEATING, J. I am of the same opinion, and upon the short ground last adverted to by my Brother Willes. The objector here has given notice of objection in a form which the statutes say shall be sufficient. Mr. Edwards's contention is, that, by s. 22 of 31 & 32 Vict. c. 58, the form of notice which before was sufficient has ceased to be so, by reason of the township of Spotland having been placed partly in one polling district and partly in another. If the effect of that enactment had been by necessary implication to repeal the previous provisions as to claims and objections, there would have been much weight in the argument. But I fail to discover in it anything which is necessarily inconsistent with the forms previously given by the legislature. We ought always to be most careful in holding an Act of Parliament to be repealed by implication, especially in a case like this, where a man who cannot be supposed to be skilled in the construction of Acts of Parliament has followed the plain words of an existing statute. I think the notice of objection was sufficient, and the decision of the revising barrister right.

BRETT, J. But for s. 22 of 31 & 32 Vict. c. 58, I should have thought this case not arguable. It was plainly sufficient for the objector to follow the form given by the statutes. The 22nd section

1871

CHORLTON
v.
TONGE.

is no doubt a difficult one to construe. At first I thought it was to be construed as applying to every step in the registration, from the beginning to the end. But, if that were so, the whole machinery must be altered. On the other hand, if it is to be construed as being confined to the actual revision before the barrister, it would lead to this difficulty, that all the previous steps might have been taken under the old statutes, and the barrister at the revision would have to determine upon the list of which polling district each voter's name was to be placed. It seems to me that there is an intermediate interpretation, and that (though I have some doubt) it may be construed as applying to all acts done for the purpose of revision by those who are responsible for the formation and revision of the lists. If that be the true interpretation of the section, the acts of a claimant or an objector are not the acts of such a person, and consequently not within the Act. It is limited to all acts, whether ministerial or judicial, which are done directly for the purposes of the revision.

COLLIER, J. I am of the same opinion. It is enough to say that the words "for the purposes of the revision" in s. 22 of 31 & 32 Vict. c. 58, do not so necessarily include acts done by the objector as to repeal the provisions of the former statutes.

Decision affirmed.

Attorneys for appellant: *Horne & Hunter, for Blain & Chorlton, Manchester.*

BUCKLEY, APPELLANT; WRIGLEY, RESPONDENT.

1871
Nov. 21.

Parliament—County Vote—Deductions to be made in ascertaining the Net Yearly Value—8 Hen. 6, *c.* 7.

Forty-eight persons were possessed, as tenants in common in fee, of land of the yearly value of 141*l.* 14*s.* 4*d.*, subject to deductions, for chief-rent, repairs, commission for collection of the rents, &c., amounting in the whole to 40*l.* 8*s.* 2*d.*, leaving a net yearly value of 101*l.* 4*s.* 2*d.* to be divided among the forty-eight owners. During the year ending on the 31st of July, 1871, for the convenience of the tenants, a sum of 21*l.* 19*s.* 1*d.* was expended by the owners in laying on water to the premises, in consideration of which the rent was increased to 143*l.* 2*s.* 10*d.*; and if the sum of 21*l.* 19*s.* 1*d.* were added to the other deductions proper to be made from the gross annual value, the interest of each tenant would be reduced below 40*s.* a year:—

Held, that this outlay of 21*l.* 19*s.* 1*d.* for the improvement of the property ought not to be deducted; and the owners were, therefore, entitled to votes for the county.

APPEAL from the Revising Barrister for the southern division of the West Riding of Yorkshire.

The names of the appellant and of forty-seven other persons were on the list of voters, for qualifications described as "share of freehold houses and land" in the township of Saddleworth, called Valley Cottages, Woodend, near Mossley; and the appellant and the other persons were duly objected to as not being entitled to have their names retained on the list.

The conveyance of the property was in fee, and dated in January, 1870, and was to R. S. Buckley and another, in trust for themselves and forty-six other persons (including the appellant) in forty-eight equal undivided shares, as tenants in common.

The gross annual rental at the date of the conveyance, and thenceforward up to June, 1871, was 141*l.* 14*s.* 4*d.*; but, for the year between the 31st of July, 1870, and the 31st of July, 1871, the gross annual rental was 143*l.* 2*s.* 10*d.*, the increased rent of 1*l.* 8*s.* 6*d.* being occasioned by the bringing into the dwelling-houses a supply of water from the Ashton-under-Lyne, Staleybridge, and Duckinfield Waterworks; and such bringing in of water was a convenience to the tenants, who were charged in respect of it an increased rent; and the increase of rent took place in June, 1871, when such water supply commenced. Thus, the

1871

BUCKLEY
v.
WRIGLEY.

gross annual value of the property during the year between the 31st of July, 1870, and the 31st of July, 1871, was 141*l.* 14*s.* 4*d.*, plus 1*l.* 8*s.* 6*d.* (the increase of rent obtained between June, 1871, and the 31st of July, 1871), equal to 143*l.* 2*s.* 10*d.*

The houses were managed by an agent, who was paid by commission, which the revising barrister found to be necessary, and who expended during the year between the 31st of July, 1870, and the 31st of July, 1871, in repairs and otherwise in respect of the houses in question the following amounts, which the revising barrister held, in the absence of any other evidence, to be necessary expenses, and proper to be deducted from the gross annual rental:—Chief rent, 4*l.* 11*s.* 6*d.*; right of way, 1*l.* 10*s.*; repairs, 26*l.* 15*s.*; commission, 7*l.* 1*s.* 8*d.*; expended for laying on water for use of the tenants of the houses, 21*l.* 19*s.* 1*d.*; total, 61*l.* 17*s.* 3*d.*; which, being deducted from 143*l.* 2*s.* 10*d.*, the gross annual rental, left a net annual value of 81*l.* 5*s.* 7*d.*

The latter sum, being equally divided among the forty-eight tenants in common, left a less sum than 40*s.* annual value to each.

Upon this the revising barrister disallowed the votes of the appellant and the other tenants in common.

If the revising barrister was wrong in deducting the sum of 21*l.* 19*s.* 1*d.* from the gross rental, for the purpose of estimating the annual value, then the vote of the appellant was to be allowed, and his name and the names of the other tenants in common were to remain in the list of voters.

C. Bowen, for the appellant. The laying on the water was the voluntary act of the landlords, with a view to increase the value of the property. It is difficult to understand how that could diminish their interest in the land. The expenditure might have been necessary to the obtaining the increased rent; but the original rent of 141*l.* 14*s.* 4*d.* was enough to give each of the forty-eight tenants in common a clear 40*s.* per annum. "To satisfy the statute" (8 Hen. 6, c. 7), says Willes, J., in *Rollestone* v. *Cope* (1), "two conditions must be fulfilled:—First, the land must be freehold to the annual value of 40*s.* at the least, above all charges; in the

(1) Law Rep. 6 C. P. 292, 301.

original 'outre les reprises,'—a term never applied, that I can find, to a payment which redounds to the permanent benefit of the owner of the land, like building a house, or such like, but only to such payments as rent-charges, ordinary repairs, taxes, and, by analogy and statute, to interest, the payment of which once made is so much spent and gone, neither enjoyed by nor invested for the owner or mortgagor. Secondly, the voter must be able to expend, that is, have for his own benefit, 40*s.* by the year."

Pickering, Q.C., for the respondent. The question is simply one of fact; and the revising barrister has determined it by finding that the expenditure incurred in laying on the water was a necessary outlay and a convenience to the tenants. In *Hamilton* v. *Bass* (1), where repairs and expenses of collection were held to be properly deducted in ascertaining the clear yearly value, Jervis, C.J., said (2): "The revising barrister finds that, if the sum expended for necessary repairs to enable the owners to obtain the rent of 63*l.* 3*s.* 7*d.* be deducted, the share of each is of less than the value of 40*s.* per annum. The question whether or not the premises are of the yearly value of 40*s.* is in each case a question of fact, to be determined by all the surrounding circumstances." So here, the expenditure of the 21*l.* 19*s.* 1*d.* is found as a fact to be necessary to the enjoyment of the property.

[WILLES, J. It must be borne in mind that by the expenditure of that sum 1*l.* 8*s.* 6*d.* per annum is added to the value of the property. Ordinary repairs must be deducted, but not an extraordinary expenditure for the purpose of increasing the value.]

In *Moorhouse* v. *Gilbertson* (3) the votes were disallowed because the clear yearly interest of each was reduced below 40*s.* by the payment of a water-rate and a local board of health rate. In *Coogan* v. *Luckett* (4), Tindal, C.J., says that "what is the clear yearly value of the premises must be a question of fact to be determined by the revising barrister upon the evidence before him." In *Sherlock* v. *Steward* (5), the value was reduced by commission paid to the agent for collecting and dividing the rents.

---

(1) 12 C. B. 631; 22 L. J. (C.P.) 29.

(2) 12 C. B. 638.

(3) 14 C. B. 70; 23 L. J. (C.P.) 19.
17 Jur 1184
(1) S C 17 Jur 915

(4) 2 C. B. 182, at p. 185.

(5) 7 C. B. (N.S.) 21; 29 L. J. (C.P.) 87. 6 Jur N.S. 811.

Erle, C.J., there says (1): "That which we have to look to is, to see that the party has an estate of the clear yearly value of 40*s.* Now, it is found by the revising barrister that the several owners of this property could not obtain the 40*s.* a year which is required by the statutes, without incurring a *necessary* expenditure of a sum for its collection which would reduce the yearly value to each to a sum less than 40*s.* If this reduction was the result of a necessary outgoing, it is clear that the parties have not 40*s.* by the year which they may expend. . . . The revising barrister has found as a fact that the allowance of the commission for the collection of the rents was, from the nature of the property, *necessary*,—that is, as I understand it, that, but for the allowance which reduced the value to each of the owners below 40*s.* a year, he would not be in a position to expend 40*s.* by the year." And Williams, J., said: "In general, the rental represents the yearly value; and the yearly value cannot vary as the landlord may or may not, in order to save himself the trouble and inconvenience of doing it himself, employ a collector to perform that service for him. Here, the expense is incurred, not for the mere purpose of avoiding trouble and inconvenience, but because, as the revising barrister has found, it was necessary. I think we are bound by his finding."

C. Bowen was not heard in reply.

KEATING, J. I am of opinion that the decision of the revising barrister was wrong, and that the votes in question should be allowed. If I could have adopted the argument of Mr. Pickering, that the expenditure of the 21*l.* 19*s.* 1*d.* was necessary for the obtaining of the amount of rent required to qualify these forty-eight tenants in common, I should have come to the conclusion that the decision of the revising barrister was right. But, on reading the case and the decision, it appears to me to be plain that what he meant was this, that the laying on of water to the houses was a convenience to the tenants, and that, in consideration of the outlay for that purpose, they paid an additional rent. Mr. Pickering suggests that the revising barrister meant to say that the rental of 141*l.* 14*s.* 4*d.* could not be obtained without the expenditure of the 21*l.* 19*s.* 1*d.* If he had meant that, he would have said so. What

(1) 7 C. B. (N.S.) at p. 26. 6 Jur NS. 612.

he does say is that the outlay of 21*l.* 19*s.* 1*d.* was an expenditure without which the rent of 143*l.* 2*s.* 10*d.* could not be obtained. In holding his conclusion to be wrong, I do not think we at all break in upon the principle of *Sherlock* v. *Steward* (1), where it was held that an annual charge necessarily incurred in order to realize the rent was to be deducted.

My Brother Willes, who has been obliged to leave the court, authorizes me to say that he entirely concurs with our decision.

Brett, J. The decision depends upon the construction to be put upon the language used by the revising barrister. If he meant to say that the expenditure of the 21*l.* 19*s.* 1*d.* was necessary to produce an amount of rent which would give each of the forty-eight tenants in common 40*s.* a year beyond all charges, the case would be brought within *Sherlock* v. *Steward*. (1) On the other hand, Mr. Pickering admits that if he only meant that, though a rent of 141*l.* 14*s.* 4*d.* could be obtained from the premises without the expenditure of the 21*l.* 19*s.* 1*d.* for the water supply, the increased rent of 143*l.* 2*s.* 10*d.* could not, the votes ought to have been allowed. The revising barrister finds that the laying on of the water was a convenience to the tenants; and that is all he meant. In estimating the net yearly value of the property, the capital expended in procuring an additional luxury clearly is not to be deducted.

Decision reversed.

Attorneys for appellant: *Rickards & Walker.*
Attorneys for respondent: *Baxter, Rose, Norton, & Co.*

---

(1) 7 C. B. (N.S.) 21; 29 L. J. (C.P.) 87. 6 Jan Ad/6/1.

1871
Nov. 22.

SIMEY, Appellant; DIXON, Respondent.

Parliament—County Vote—Notice of Objection—Statement of Ground of Objection—28 *Vict.* c. 36, *s.* 6.

A notice of objection to a voter on the register of county voters, stated that the objection was grounded on the third column, and that it related to the nature of the voter's interest in the qualifying property. The objection sought to be proved was, that the qualifying property, being situate within a parliamentary borough, was such and so occupied as to give the right of voting for the borough:—

Held, a sufficient notice of objection within the terms of 28 Vict. c. 36, s. 6.

Appeal from the decision of the Revising Barrister for the northern division of the county of Durham.

The name of William Cocken, appeared in the list of persons entitled to vote for the county, in the following manner:—"Cocken, William" "The Rectory, Bishopwearmouth," "Freehold Benefice," "Bishopwearmouth Parish."

The name was objected to.

It appeared in evidence that this was the name of the rector of Bishopwearmouth, and that the qualification, for which it was endeavoured to retain his name on the list, was the parsonage house of the rectory, to which he was entitled in right of his benefice. It was proposed on behalf of the objector to prove that the house was situated within the parliamentary borough of Sunderland, and that it was and had been occupied by the voter a sufficient time to entitle him to a borough vote.

Exception was taken on behalf of the voter to the admissibility of the proposed evidence, on the ground that the notice of objection did not entitle the objector to go into this particular ground of objection.

The notice of objection produced was in the form given by 28 Vict. c. 36, sched. A., No 2, and specified the ground of objection in the following words:—

"And I ground my objection on the third column of the register, and the objection relates to the nature of your interest in the qualifying property."

The revising barrister was of opinion that having reference to 2 Wm. 4, c. 45, s. 24, the notice in point of form and particulars satisfied the 28 Vict. c. 36, and was sufficient to entitle the objector to give in evidence the above facts.

The revising barrister therefore admitted the evidence, and erased the name from the list.

Udall, for the appellant. The objector was not entitled to give evidence of this objection under the notice of objection which was given. It is provided by 28 Vict. c. 36, s. 6, that the notice of objection to a person on the register must state the ground of objection specifically, and for that purpose must name the column or columns of the list on which the objection is grounded. The notice should have referred to the fourth column, inasmuch as the nature of the objection relates to the local situation of the property. If that be not so, the objection would not come under any column of the register, and a special notice ought to have been given under those circumstances. There are other similar cases, such as those of an objection on the ground of conviction of bribery, or receipt of parochial relief. The intention of the Act is to give the person objected to notice of the objection which he has to meet. The notice of objection in this case would give no such information: *Bennett* v. *Brumfitt*. (1)

Quain, Q.C., for the respondent, was not called upon.

WILLES, J. I am of opinion that the revising barrister's decision was correct. The only question raised is, whether the notice of objection was sufficient within the terms of the statute. The qualification stated was "freehold benefice," but that was limited before the revising barrister to the claim for a parsonage house. It appears that such house was situated within the parliamentary borough of Sunderland, and the voter's interest and occupation were such as to entitle him to a vote for the borough. Consequently, if he were duly objected to, the county franchise would be denied to him by reason of the provisions of the 24th section of the Reform Act. Now, the notice of objection is given under 28 Vict. c. 36, s. 6, which enacts that "no notice of objection given under the provisions of s. 7 of 6 Vict. c. 18, other than a notice to overseers, shall be valid unless the ground or grounds of objection shall be specifically stated therein, and this provision shall be deemed to be sufficiently satisfied by naming the column or columns of the list on which the objector grounds his objection: provided always, that if the objection be grounded on the third column, then it shall be necessary to state in the notice whether the objection relates to the nature of the voter's interest in the qualifying property, or to the value of the qualifying property, or both."

---

(1) Law Rep. 4 C. P. 407.

I reject altogether the notion that this objection should have been taken to the fourth column. The description given in that column was correct. The objection to the third column, it seems to me, distinctly pointed to the class of evidence that was given here in support of it. It was a part of the nature of the interest that the rector had in the parsonage house that he should have a right to vote in respect thereof for the borough, and, consequently, not a part of the nature of such interest that he should have a vote for the county. It was urged that the notice of objection was not sufficiently specific. It seems to me clear that it was so within the terms of the Act, and that it sufficiently pointed to an objection such as was afterwards taken.

BYLES, J. I am of the same opinion. The notice of objection was to the third column of the list. In that the nature of the qualification was described as "freehold benefice." The finding of the revising barrister explains this as referring to the parsonage house, and shews that if the objection be well taken the qualification was insufficient. No point is now raised before us except as to the sufficiency of the notice of objection, and that appears to me clearly to be sufficient.

BRETT, J. This objection is not one to a person on the list of claimants, but to a person on that part of the list which is a copy of the old register. Under the principal Act (6 Vict. c. 18) the notice of objection was to be according to sched. A. No. 5, and was a general notice of objection. It was thought that in certain cases such a notice was too general; and by 28 Vict. c. 36, s. 6, an objection to any person on the list of claimants is to be in the same form as before; in any other case, the notice to the overseers may also be in the old form, but the notice to the person objected to is to state the ground or grounds of objection specifically. It is urged that the notice of objection here did not so state the grounds of objection, but the legislature goes on in the subsequent part of the section to shew what they meant by "specifically." The provision is to be deemed to be sufficiently complied with by naming the column on which the objection is grounded. It is then further provided that in the case of an objection to the third column the notice must specify whether the objection relates to the nature or value of the interest. In this case the notice of objection referred to the third column, and stated that the objection was to the nature of the interest. It is urged that it should have referred to the fourth column. If it had, how would it have given notice of the real ground of objection? The fourth column states the local situation of the property. It was situated at the place mentioned. It is clear that the objection was not to the description of the property; it was that the nature of the interest that the claimant had in the rectory house was such as not to give him a vote for the county. Obviously, therefore, the requirements of the Act have been strictly complied with.

Decision affirmed.

Attorney for appellant: *Hickin.*
Attorney for respondent: *Southgate.*

HUCKLE, APPELLANT; PIPER, RESPONDENT.

Nov. 22.

Parliament—County Vote—12l. Occupier—Occupation under different Landlords —Separate Ratings—Representation of the People Act, 1867 (30 & 31 *Vict.* c. 102), s. 6.

It is not necessary, in order to entitle an occupier of lands to a vote under the 6th section of the Representation of the People Act, 1867, that he should have occupied such lands in one holding, or under the same landlord, or that there should have been one entire rating of the whole of the qualifying property. It is sufficient if the aggregate rateable value of lands occupied under different landlords amounts to 12*l*., and the occupier has been rated to all rates made during his occupation in respect of the several pieces of land so occupied by him respectively.

APPEAL from the Revising Barrister for Bedfordshire.

The name of Henry Jeeves appeared on the list of persons entitled to a vote for the county in respect of the occupation as owner or tenant of lands or tenements, within the parish of Sandy, of the rateable value of 12*l.* or upwards.

The name was duly objected to.

It was proved that Jeeves had occupied for a sufficient time on the 31st of July last as tenant lands and tenements in the parish of Sandy under four separate and distinct landlords, being separate and distinct owners of the respective lands and tenements, in respect of all which lands and tenements Jeeves was separately assessed to the poor-rates in the sums following—5*l.* 10*s.*, 1*l.*, 2*l.* 12*s.* 9*d.*, and 5*l.* 12*s.* 6*d.* The lands and tenements comprised in such four several and distinct occupations were properly and fully assessed to the poor-rates. During the time of such respective occupations, Jeeves had been rated in respect of the premises so respectively occupied by him to all the rates made for the relief of the poor in respect of the said premises, and had paid all the rates.

It was objected that the name of Jeeves could not be retained on the list, inasmuch as he was not separately assessed to the poor-rate in respect of a separate occupation of premises of the rateable value of 12*l.* and upwards, and was not the occupier of premises under one landlord of the rateable value of 12*l.* and upwards, and that the four separate assessments which, when taken together, made an aggregate sum of 14*l.* 15*s.* 3*d.*, were not a sufficient qualification under the 6th section of the Representation of the People Act, 1867, to enable the revising barrister to retain the name on the list.

The revising barrister held that the qualification was sufficient, and retained the name on the list.

Bulwer, Q.C., for the appellant, contended that the occupation required by the 2nd subsection of the 6th section of the Representation of the People Act was an occupation under the same landlord, and that the rating required by the 3rd subsection of the same section was one rating in respect of the whole of the premises. He cited the case of *Gadsby* v. *Barrow* (1), the 27th section of the Reform Act (2 Wm. 4, c. 45), and the 130th section of the Representation of the People Act, which requires the overseers to make out the list of 12*l.* occupiers in the county in the same manner, and subject to the same regulations as nearly as circumstances admit, in and subject to which the list of 10*l.* occupiers in boroughs is made out.

---

(1) 7 M. & G. 21.

Hugh Shield, for the respondent, was not called upon.

WILLES, J. I think the decision of the revising barrister was correct. The case appears to me to be clearly within the words of the 6th section of the Representation of the People Act. The lands in question were in the occupation of the claimant as tenant; the Act does not say that the occupation must be under one landlord. It is not questioned that the rateable value of the several pieces of land taken together amounted to more than 12*l.*, and there does not seem to me to be anything in the words of the Act to prevent the tenant from adding up the rateable value of several pieces of land to make up the requisite rateable value. The tenant had, during his occupation, been rated in respect of the premises occupied by him to all rates made for the relief of the poor in respect of such premises. It is true that he was rated separately in respect of the several portions of land he occupied, but there do not appear to be any expressions in the Act which involve the necessity of a single rating in respect of the whole of the premises.

The question whether the case came within the 2nd subsection of the section seems to me to be a mere matter of addition. The only objection that appears capable of serious argument arises upon the 3rd subsection. It may be contended that the rating therein referred to must be one rating in respect of every portion of the land occupied, whereas here there were separate ratings in respect of separate portions. The case of *Gadsby* v. *Barrow* (1) was cited as an authority. It was said that the principle of that decision applies to the present case as well with reference to the alleged necessity for unity of holding as with reference to that for unity of rating. The decision in *Gadsby* v. *Barrow* (1) turned upon the 20th section of the Reform Act. That section deals first with lessees and assignees of terms originally created for not less than sixty years; secondly, with lessees and assignees of terms of not less than twenty years; and, thirdly, with the case of occupation

(1) 7 M. & G. 21.

of lands or tenements at a yearly rent. Thus the provisions as to occupiers follow two provisions which clearly relate to premises held under one tenancy; the expression "term" involves such a holding: and it is plain that the expression a "yearly rent" must refer to a single holding: two separate rents of 25*l.* each issuing out of two pieces of land held under different landlords would not satisfy it. The reason of the decision is therefore very intelligible. Maule, J., in giving judgment, says, "It is observable that this section confers the right of voting in respect of the liability to pay a certain rent; it is not the value of the land or the payment of the rent which is the criterion. This is very peculiar. Where the franchise is given in respect of the value of the land occupied, the case is very different. Then the right would appear to be intended to be conferred in respect of the value, although made up of several items." That decision is plainly not applicable to the present case.

With respect to the 2nd subsection, the only condition there imposed is that the premises shall be of a certain rateable value. It is quite immaterial whether such value is made up by several holdings or by one. With respect to the 3rd subsection the same reasoning does not apply to the rating mentioned there as applies to the rent mentioned in the 20th section of the Reform Act. It would be straining the language, which merely provides that the person occupying shall have been rated in respect of the premises, to say that this involves the necessity of his being rated by one rating in respect of the whole of the premises. There is no expression used in the section which renders it necessary to introduce any such qualification.

With respect to the arguments derived from the section referring to the making out of the list by the overseers, that is mere procedure and cannot import anything in the nature of a condition into the section that gives the franchise.

BYLES, J. I am of the same opinion. Two objections were raised—1st, that the different portions of the property were separately assessed; 2nd, to the nature of the occupation. With respect to the first question, I do not see anything in the Act to prevent the adding together of the rateable value of several holdings to form a sufficient aggregate amount. With respect to the second objection, there is nothing in the 6th section of the present Act similar to the expressions used in the 27th section of the Reform Act which confined the qualification by occupation, in certain cases, to an occupation under the same landlord.

BRETT, J. I am of the same opinion. It appears to me that we ought, in construing the Act, to follow as far as possible the words actually used by it. There may be some cases in which a somewhat liberal construction may be absolutely necessary; but, as a rule, whether the result be in favour of or against the franchise, I think a strict construction ought to prevail. As I understand the case, it must be taken that the aggregate rateable value of the lands was upwards of 12*l*., not merely that they were rated at more than 12*l*. The only objection was, that they were occupied under different landlords. Now, if the words of the 6th section be taken, it will appear that the case comes within the strictest construction of them; but then it is urged, if I understand the argument, that we must introduce an incident to the qualification similar to that contained in the 27th section of the Reform Act with respect to the borough qualification. Let us see, therefore, what is incident to that qualification. The subject-matter of occupation under that section is a "house, warehouse, &c., being either separately or jointly with any land within such borough, &c. occupied therewith by him as owner, or occupied therewith by him as tenant under the same landlord." These last words apply only to the case of a qualification made up of a house jointly occupied with land. So far, therefore, as the language of the Act is concerned, occupation under the same landlord is not made a necessary incident to every case of qualification by occupation in a borough. What ground, then, can this section afford for introducing a similar incident into the county qualification? Apart from this consideration, however, I should be disposed to stand by the words of the 6th section.

Decision affirmed.

Attorneys for appellant: *Williams & James.*

Attorneys for respondent: *Saunders, for Whyly & Piper.*

1871
Nov. 22.

CHORLTON, APPELLANT; OVERSEERS OF STRETFORD, RESPONDENTS.

Parliament — County Vote — Sub-Lessee for Sixty Years — "Term originally created"—Representation of the People Act, 1867 (30 *&* 31 *Vict. c.* 102) *s.* 5*—Reform Act* 1832 (2 *Wm.* 4, *c.* 45), *s.* 20.

A sub-lessee is within the provisions of the 5th section of the Representation of the People Act, 1867, which gives the right of voting to the lessee or assignee of lands or tenements for the unexpired residue of any term originally created for a period of not less than sixty years, &c.

Semble, per Brett, J., that the effect of ss. 56 and 59 of the Representation of the People Act is, that the proviso to s. 20 of the Reform Act must be read into s. 5 of the Representation of the People Act, and therefore that to be entitled to a vote under that section the sub-lessee must be in actual occupation of the premises.

APPEAL from the decision of the Revising Barrister for the south-eastern division of Lancashire.

Thomas Sowood, on the list of persons claiming to be entitled to vote for the township of Stretford, in respect of "leasehold houses, term over sixty years," was duly objected to. Sowood was a sub-lessee for a period of not less than sixty years of, and was in actual occupation of, a house, the clear yearly value of which was 5*l.*, but under 10*l.*, over and above all rents and charges payable out of or in respect of the same.

It was contended, on behalf of the claimant, that the 5th section of the Representation of the People Act, 1867, extended to the case of a sub-lessee as well as to that of a lessee, and that such s. 5 was in substitution for and was substantially a repeal of the part of the 20th section of 2 Wm. 4, c. 45, which relates to the clear yearly value of leaseholds, notwithstanding the 56th and 59th sections of the Act of 1867.

The revising barrister considered that the claimant did not come within the 5th section of the Representation of the People Act, because he was not entitled to the house as lessee or assignee for the unexpired residue of any term originally created; that the claim could not be supported under the 20th section of the Reform Act, because the lease was not of the clear yearly value of not less than 10*l.*; and, thirdly, that the two Acts could not be construed as if the last part of the 20th section of the

Act of Wm. 4, beginning with the words "Provided always," formed part of the 5th section of the Act of 1867. He therefore expunged the claimant's name, deciding that to entitle a person being only a sub-lessee of premises to a vote for the county, such premises must be of the clear yearly value of not less than 10*l.* over and above all rents and charges.

Joshua Williams, Q.C. (*Edwards* with him), for the appellant. The revising barrister appears to have considered that the words "originally created" meant created by the freeholder. They cannot have that meaning. They only mean that the lease which is to qualify must at its commencement be for a term of not less than sixty years. It is quite clear that the word "lessee" includes a sub-lessee; if there were any doubt on the subject it would be dissipated by a reference to the proviso to s. 20 of the Reform Act, which shews that the legislature, in a section dealing with the same subject, considered that the term "lessee" included a sub-lessee. It seems that the only intention of the 5th section of the new Act is to reduce the requisite value from 10*l.* to 5*l.* without altering the other requisites of the qualification. The provisions of the 5th section must therefore be construed by the light of the 20th section of the Reform Act: *Warburton* v. *Overseers of Denton.* (1) In the present case the claimant was in occupation, so no question can arise under the proviso to s. 20.

The respondents did not appear.

WILLES, J. I am of opinion that the decision of the revising barrister was wrong. He appears to have thought that an under-lessee was not a lessee within the 5th section of the Representation of the People Act, 1867. [The learned judge read the section.] The revising barrister cannot, I think, have come to that conclusion from any notion that a demise by a person having only an interest for years is any the less a lease, because in relation to the interest out of which it is created it is an underlease. It is no part of its description when regarded as creating an interest that it is an underlease. The legal right created is the same whether the freeholder created it or a leaseholder, and there is no reason why any difference should

---

(1) Law Rep. 6 C. P. 267.

1871

CHORLTON v. STRETFORD.

be made for the purposes of the franchise. I think the revising barrister's decision must have proceeded upon the words "originally created": his attention must have been distracted from that with which those words are intended to deal, viz., the term in respect of which the claim is made, and which in its origin was in this case created for a sufficient number of years, and he must have looked to the origin of the title to that term, instead of the term itself. The expression "originally created" is somewhat remarkable; but it appears to be used merely to express that whatever the residue of the term left may be, it shall confer the right of voting, provided the term when created was a term of sixty years. If any doubt could arise on these words, it would be immediately removed on reference to the 20th section of the Reform Act, where precisely similar language is employed. That section is not merely in pari materiâ, but is dealing with the very same subject. The meaning at once appears from the proviso. That proviso ought not to be read as extending the meaning of the term "lessee," for "lessee" undoubtedly includes "sub-lessee," and for that very reason, and because great abuses might result from splitting up the term for the purpose of creating votes, it is provided that a sub-lessee or assignee of a sub-lessee shall not vote unless he be in actual occupation of the premises. It is clear, therefore, not only that the term lease properly includes a sub-lease, but that the legislature, in using it in a section dealing with the very same subject-matter in precisely similar terms, employed it in that sense. The case of *Warburton* v. *Overseers of Denton* (1), which was referred to, is an authority of peculiar weight in relation to this question. We there held that a claim which might have been considered as coming within the word "tenements" under the 5th section of the Representation of the People Act, could not be treated as included in that expression, because it could not have fallen within the 20th section of the Reform Act, by reason of the proviso to the latter which introduces actual occupation as a condition in the case of a sub-lessee, thus shewing that the section could only have been intended to apply to corporeal tenements. Having considered ourselves bound by the relation between the two sections for the purposes of that case, we are bound by parity of reasoning to hold that the 5th section includes the case of a sub-lessee.

---

(1) Law Rep. 6 C. P. 267.

A question may arise in future, with reference to a claim under s. 5 of the Representation of the People Act by a sub-lessee who is not in actual occupation, by reason of the proviso to s. 20 of the Reform Act not having been expressly repeated in s. 5. No such question arises here, inasmuch as the sub-lessee was in actual occupation.

BYLES, J., concurred.

BRETT, J. I am of the same opinion; the question is whether the case comes within the 5th section of the Representation of the People Act. If that section had stood alone, I should have been of opinion that the case was within it. A sub-lessee is unquestionably a lessee. The words "originally created" refer to the creation of the term in respect of which the claim is made. Then looking at the 5th section, and observing that the first part of it repeats in terms the 19th section of the Reform Act, and the latter part of it repeats the terms of the 20th section of the Reform Act, and that reference is expressly made to the 26th section of that Act, it would seem that the real effect of the section is not to create a new franchise, but only to lower the value required from 10*l.* to 5*l.* I cannot help thinking, though it is not necessary to consider the point here, that having regard to the provisions of the 56th and 59th sections of the Representation of the People Act, 1867, the 5th section is not to be read as a substitution for the provisions of the former Act, except where it is absolutely necessary that it should be so read. It is absolutely necessary with regard to value, but not with respect to other matters. Therefore, I am at present disposed to think that, whenever the question shall arise, the proviso to the 20th section of the Reform Act ought to be read into the Representation of the People Act.

Decision reversed.

Attorneys for appellant: *Blain & Chorlton.*

1871
Nov. 22.

FERNIE, APPELLANT; SCOTT, RESPONDENT.

Parliament—County Vote—Freehold Interest—Estate for Life—Allottee of Land.

The corporation of Stafford were for many years before the Municipal Corporations Act, 1835, possessed of certain lands within the borough, which were thus dealt with:—Each member of the council of the borough had two acres of such land for his life, which his widow after his decease continued to occupy, while a widow and a resident in the borough. The rest of the lands were held in allotments of one acre by the persons selected for that purpose by the mayor, and rents of various amounts were paid in respect of such occupation. In 1836 a bye-law was passed by the town council which provided that the lands should thenceforth be held and enjoyed in allotments of one acre each by "poor and necessitous" burgesses of the borough at rents to be fixed and ascertained by the council of the borough from time to time, as occasion should require, at the reasonable discretion of the council. The bye-law further provided, that for the purposes thereof only such persons should be considered poor and necessitous burgesses as were declared to be so by the majority of a meeting of the council, and that certain grounds of preference mentioned in the bye-law, viz., seniority as a burgess and number of children, should be regarded alternately in the selection of such burgesses. It was also provided that if any burgess died in the occupation of such lands, and left a widow, such widow should continue to occupy, if a resident in the borough. One of the burgesses of Stafford had been declared by a meeting of the council to be a "poor and necessitous" burgess, and had been admitted to an acre of the land in question under an order of the council, which ordered that such acre should be delivered to him as tenant thereof to the council, and that he should pay 5*s*. per annum as and for rent until further notice:—

Held, that the interest of the burgess in the land to which he was so admitted did not amount to a freehold estate for life so as to entitle him to a vote for the county.

APPEAL from the Revising Barrister for Staffordshire.

Alexander Scott duly objected to the name of Joseph Abberley being retained on the list for the western division of the county.

The following facts were established in evidence:—The mayor, aldermen, and burgesses of the borough of Stafford, for many years previously to the passing of the Municipal Corporations Act, 1835, were possessed of certain lands situate within the borough, and known by the name of Coton Field.

2. Before the year 1835, the custom and practice of the mayor, aldermen, and burgesses with regard to the occupation of the lands was as follows:—Each member of the common council, usually called the corporation, had two acres for his life, and his

widow after his decease, so long as she continued such widow and resident in the borough; but a non-residence in the borough, or the receipt of parochial relief, was a forfeiture of the holding. The other acres, as they became vacant by death or forfeiture, were distributed by the mayor for the time being, one each to be held by those persons whom he selected, for the same tenure, and under the same customs as those above described. If the acre was in tillage, 5*s.* was paid by each person to the treasurer of the corporation as entrance money on taking possession. If in grass, 10*s.* as entrance was paid. The rents have varied, some having paid 2*s.* 6*d.*, others 3*s.* 6*d.*, and others 5*s.* a year.

3. The Municipal Corporations Act superseded the old charter under which Stafford became a corporation.

4. In the year 1836 a bye-law was enacted to point out the manner in which the corporation of the borough of Stafford should deal with Coton acres.

5. The following is the bye-law referred to:—"Borough of Stafford, to wit. At a quarterly meeting of the council of the borough of Stafford, held this 9th day of February, 1836, at the mayor's office within the said borough, two-thirds of the whole council being present, to wit" (here followed the names of the mayor and councillors present). "It is now by the said council so assembled as aforesaid, declared, enacted, constituted, and ordered as follows: Whereas the mayor, aldermen, and burgesses of the said borough for many years now last past, to wit, from the 12th day of January, in the fourth year of the reign of our late sovereign lady Queen Anne, have been entitled to the fee simple of and in certain lands and tenements near the said borough situate in the manor of Coton, commonly called the Coton Field, subject nevertheless to a certain perpetual annual rent-charge amounting to the sum of 12*l.*, now payable to the Right Honourable Charles Chetwynd, Earl Talbot, and also to a certain perpetual annual payment amounting to the sum of 26*l.*, for the maintenance of certain almshouses in the said borough. And whereas certain orders, rules, and ordinances have been heretofore, from time to time, made and resolved by the said mayor, aldermen, and burgesses of the said borough touching the holding, enjoyment, and occupation of the said lands and tenements under the said mayor, aldermen, and burgesses, and the

reservation of the rents and profits of the same under and by virtue of which orders, rules, and ordinances the said lands and tenements have been heretofore and are now held and enjoyed by certain persons (except as hereinafter mentioned) in certain divisions or portions, each amounting to an acre, more or less, under the said mayor, aldermen, and burgesses. And whereas certain parts, to wit, two acres of the said lands and tenements, are at this time unoccupied by any tenant or holder thereof under the said mayor, aldermen, and burgesses, and it is proper and expedient that reasonable and wholesome rules, ordinances, and regulations, and orders should be made and established respecting the future holding and enjoying of the said parts of the said lands so now unoccupied; and further, respecting the future holding and enjoying of such parts of the said lands as shall hereafter become vacant; and further, respecting the future reservation of the rents and profits of such parts of the said lands and tenements as are now held, occupied, and enjoyed as aforesaid, under and by virtue of the former orders, rules, and ordinances before mentioned. Therefore it is now by the said council of the said borough so assembled as aforesaid, hereby declared, enacted, constituted, and ordered, That the said part of the said lands called Coton Field, which are now unoccupied as aforesaid, and all such parts thereof as shall become vacant, shall, in future, be held and enjoyed by no other persons whatever than the poor and necessitous burgesses of the said borough by birth or servitude duly qualified to vote for members of parliament for the said borough, or the widows of such burgesses, the said burgesses and widows being respectively resident within the borough.

"That no one burgess, or widow of a burgess as aforesaid, shall hereafter hold or enjoy more than one acre of the said lands now vacant, or which shall hereafter become vacant under the said mayor, aldermen, and burgesses:

"That such lands shall be held and enjoyed at a certain rent payable therefor to the mayor, aldermen, and burgesses of the said borough, the amount thereof and days of payment to be fixed and ascertained by the council of the said borough from time to time as occasion shall require at the reasonable discretion of the said council:

"That for the purpose of selecting from the said poor and necessitous burgesses, proper persons for the holding and enjoying the said lands under the said mayor, aldermen, and burgesses, two grounds of preference shall hereafter exist and be maintained, to wit, one ground of preference shall be in favour of that burgess who shall appear by the freeman's roll to have been a sworn burgess for the greatest space of time; and the other ground of preference shall be in favour of that burgess who for six months previous and up to the time of selection shall have had, and then has, the greatest number of children at home under the age of ten years; and that as often as any part of the lands aforesaid shall from time to time become vacant the selection of a burgess for holding the same shall be made by turns with respect alternately to the said two grounds of preference, provided that in the first instance of selecting a burgess shall be selected on the ground of the preference first above-named:

"That if any burgess shall hereafter die in the holding and enjoyment of any part of the said lands under the ordinances, regulations, and orders hereby made, and shall leave a widow, she being a resident within the said borough shall continue from the time of the death of the said husband to hold and enjoy the said part of the said lands, subject, nevertheless, to the rules, &c., which are or shall be hereafter in force in and for the said borough with respect to burgesses holding any part of the said lands as well relating to rent payable for the same as to all other things whatsoever:

"That no burgess shall be regarded or considered a poor and necessitous burgess within the meaning of the above ordinances, regulations, and orders, unless he shall be declared to be so by a majority of the council of the said borough assembled at a regular meeting of the said council:

"Provided always, that no present or any future member of the council of the said borough shall be capable of holding or enjoying the said lands so long as he shall continue a member of the said council:

"That all persons who at this present time hold or enjoy any part of the said lands under the said mayor, aldermen, and burgesses shall hereafter pay an advanced rent for the same, and that the amount of such rent, and the time from which the same shall be payable, and at which the same shall in future be payable, be respectively fixed and determined by the said council at some public or regular meeting thereof, and that each or any of such persons last mentioned who shall refuse their consent to hold the said lands so now occupied by them respectively as aforesaid at the advanced rent so to be paid and ascertained as aforesaid shall be ejected from the same by due course of law:

"And it is further ordered that so much and so many of all former orders, rules, &c., heretofore made by the said mayor, aldermen, and burgesses now in force touching the holding, enjoyment, or occupation of the said lands, and the rents and profits thereof, as is and are inconsistent with, or contrary to, the declarations, enactments, constitutions, and orders hereby made shall be, and the same is and are hereby repealed and annulled."

6. Joseph Abberley obtained possession of an acre in Coton Field as aforesaid, under a resolution of the council and watch committee of the borough of Stafford, at a meeting held on the 12th of June, 1869, which was as follows: "At a meeting of the council and watch committee of the borough of Stafford, held on Monday, the 12th of July, 1869, ordered and declared that William Taylor, who was sworn a burgess of this borough on the 19th of November, 1832, and Joseph Abberley, who was sworn a burgess of this borough on the 2nd of January, 1835, are poor and necessitous burgesses, resident within the borough, within the meaning of the bye-law dated the 9th of February, 1836—Ordered that the acre lately held by Widow Adams be delivered to the said Joseph Abberley as tenant thereof to the council, and that he do pay 5*s.* entrance money, and 5*s.* per annum as and for rent until further notice, subject to the right of the council to get sand, gravel, and stone therefrom, and under the same, pursuant to the order of the 28th of April, 1856, the council paying compensation for all surface damage."

The revising barrister decided that Abberley had not a freehold in the land called Coton Field such as would entitle him to a vote for the county, and disallowed his claim.

F. T. Streeten (*Gorst* with him), for the appellant. The question here is, whether the voter was entitled to an equitable freehold, or was merely tenant at will. It is submitted that the former was the case. The decisions on the subject establish the principle that

1871

FERNIE *v.* SCOTT.

an estate of uncertain duration, if it be such that it may be an estate for life, though it may be determinable on some contingency, is a freehold. It is laid down in Co. Litt. 42 a., that if a man grant an estate to a woman, dum sola fuerit, or durante viduitate, or quamdiu se bene gesserit, or to a man and a woman during the coverture, or as long as the grantee dwell in such a house, or for any like uncertain time; in all these cases, if it be of lands and tenements, the lessee hath, in judgment of law, an estate for life determinable, if livery be made. In this case the estate may last for life. It is clear that in practice the occupation of the burgess, once appointed, was for life, and on his decease, if he left a widow, she enjoyed till her decease. This was the custom before the bye-law, and though the bye-law alters the persons who are to have the enjoyment of the lands, there is no alteration of the tenure.

[WILLES, J. Is there any authority for saying that an estate of uncertain duration may be an estate for life, where the determination of the estate depends on the option of the grantor?]

A great number of authorities are cited in the note to *Davis* v. *Waddington* (1), and in the note to the case of *Wynne* v. *Wynne* (2), which would seem to establish the proposition. It must, however, perhaps be admitted, that if the estate depends on the mere arbitrary will of the grantor, it cannot be an estate for life. In this case, though the council had power by the bye-law to fix the rent from time to time, it gave them no power to determine the estate. In any case the estate could not be determined by them at their mere arbitrary will and pleasure. At the utmost they could only have a discretion, as the administrators of a public trust for the benefit of the borough, to remove from the enjoyment of the lands, if, under the circumstances of the case, such enjoyment ceased to be a proper use of the trust property. Such circumstances might, and, probably, would never arise. In practice, the burgess once admitted, occupied for his life. This case is really undistinguishable from *Beeson* v. *Burton*. (3) [He also cited *Trenfield* v. *Lowe* (4) and *Burton* v. *Brooks*. (5)]

Gough, for the respondent, was not called upon.

---

(1) 7 M. & G. at p. 45.

(2) 2 M. & G. at p. 19.

(3) 12 C. B. 647; 22 L. J. (C.P.) 33.

(4) Law Rep. 4 C. P. 454.

(5) 11 C. B. 41; 21 L. J. (C.P.) 7.

WILLES, J. I am of opinion that the decision of the revising barrister was correct. There was not, in this case, a freehold interest, either legal or equitable. The history of the connection between the corporation and these lands is somewhat meagre, but it appears to me clear that the legal freehold of the lands is vested in the corporation. The mode of enjoyment of these lands before the making of the bye-law, the validity of which was not seriously contested, was altogether different from that after the bye-law. A different class of persons formerly had the beneficial occupation from those to whom it is now accorded. It would seem from this that the land was vested in the corporation, and that they had the power of dealing with it, from time to time, for such purposes as they thought best. This is not a case where the legal estate in the land is vested in the corporation, but certain equitable rights, amounting to freeholds, are impressed thereon in favour of particular members of the corporation, in which case, if the value of these rights amounts to 40*s.* a year, such persons are entitled to vote by virtue of s. 74 of 6 Vict. c. 18. In order to come within that section the person claiming a vote must make out that he is entitled to an equitable interest amounting to a freehold: that he enjoys as a distinct owner, not merely as a member of a corporation. An example of such an interest existed in the case of *Fryer* v. *Bodenham.* (1) The case of *Durant* v. *Kennett* (2), the case of the Naval Knights of Windsor, shews that mere occupation as a member of a corporation, by way of enjoyment of the freehold of the corporation, is not sufficient. In such a case the occupier does not enjoy as owner. In the present case the occupier did not, as it seems to me, enjoy as owner of a freehold interest, but only as a tenant to the council. I pass over the alleged custom, because the claimant was not appointed under it, and the claim is not put forward as being grounded upon it. The claimant's interest in this case is founded directly upon the order under which he came into possession, and indirectly upon the bye-law, which must be taken on the statement in the case to have been legally made. The order recites that the claimant was a poor and necessitous burgess: that is made the foundation of the order, and only such burgesses are recognized as being entitled to the enjoyment of the lands. His oc-

(1) Law Rep. 4 C. P. 529.

(2) Law Rep. 5 C. P. 262.

1871

FERNIE
v.
SCOTT.

cupation is obviously to be regarded as not primarily for his own benefit, but for the benefit of the corporation. The object is that the poor of the corporation may be provided for, and the rates be relieved. It is clear that such occupation is intended by the corporation as an exercise of their rights of ownership, and the case is, in this respect, similar to that of the Knights of Windsor.

5CPD

The order proceeds as follows:—"Ordered, that the acre lately held by Widow Adams be delivered to the said Joseph Abberley as tenant thereof to the council, and that he do pay five shillings entrance-money and five shillings per annum as and for rent until further notice." The meaning appears to have been that he should become a tenant at a yearly rent until further notice only. The council might cease to be satisfied with this mode of disposing of the property. The tenant of the land might receive a legacy, and so cease to be poor. Notice might then be properly given to put an end to the occupation, on the ground that he was no longer a fit person to occupy. These considerations seem to me at once to shew that there is nothing like a freehold interest in him. An interest for an uncertain period may amount to a freehold interest, but I am of opinion, notwithstanding the learned note of Serjeant Manning to the case of *Davis* v. *Waddington* (1), that the uncertainty must not depend in such a case on the mere will and pleasure of the grantor.

In the case of *Beeson* v. *Burton* (2), which was relied upon, the vote was upheld on the ground that the estate was not determinable at the will of the grantor: here it is. Mr. Streeten contended otherwise; but it is clear, on looking to the bye-law, that the council may exercise the right of determining the tenancy according to their own view of what is right with respect to the position of the tenant and the circumstances of the case. The bye-law provides that the lands are only to be held by the poor and necessitous burgesses; it makes provision for the amount that may be held by each such burgess, and that such lands are to be held at a certain rent which is to be paid from time to time, and which is clearly in the nature of a rent-service, not a rent-charge; no one is to be considered a poor burgess within the meaning of the bye-law unless he is declared to be so by a majority of the council, and in the selection of such burgesses two grounds of preference are declared, viz., the length of time that the party has been a burgess, and the number of children he has at home under the age of ten years. All these provisions appear to me plainly inconsistent with the notion that this is an estate of the nature of a freehold. It seems to me, taking these orders together, that it was competent for the council at any time to come to the conclusion with respect to any occupant, that he was not a fit person to receive the benefit of the lands within their control and to be distributed by them in the way of charity, and they reserved to themselves the power of determining when the claim to occupy should begin and when it should cease to exist, with reference to the occupant's circumstances, and at what amount the rent should be fixed from time to time. All these circumstances shew that the tenancy was at most a tenancy from year to year, and not in respect of an equitable freehold. No case exists in the books (even among the authorities referred to by Serjeant Manning, which appear, some of them, to go to an extraordinary extent), in which a freehold interest has been held to arise in such a case as the present; and I certainly do not wish to be the first to say that a person receiving the alms of a corporation under such circumstances as these can be a freeholder of the county.

---

(1) 7 M. & G. at p. 45.

(2) 12 C. B. 647; 22 L. J. (C.P.) 33.

BYLES, J. I am of the same opinion. The order of the council must be looked on as the title deed of the claimant in this case. It appears to me clear that such order does not confer on him an equitable freehold on payment of an annual rent-charge, defeasible on conditions subsequent, but merely a tenancy from year to year on payment of a rent-service. In the case of *Trenfield* v. *Lowe* (1), cited by Mr. Streeten, an estate for life was expressly given. Here, if there be such a tenancy, it must be inferred. I do not think any of the circumstances point to such an inference.

BRETT, J. I am of the same opinion. If the appellant's contention be based upon the alleged custom, it must fail. I doubt very much whether any legal custom is shewn; nothing is said as to the time during which it prevailed; it is quite consistent with the case that it had only existed five years. But, assuming that there was a valid custom, this case is not within it. The claimant was not a member of the town council, and he was not appointed by the mayor. Then, if it is attempted to support the claim by the bye-law, it must equally fail, for, as far as I can see, the council who made the bye-law can alter it at their will and pleasure, and so put an end to the right. Whether the bye-law was a good one, I give no opinion. Assuming that they could make the bye-law, it must be assumed that they could repeal all previous rules as to this land, and if so, why can they not in turn repeal this bye-law? Then, again, if the case is rested upon the order, it seems to me that that at most creates only a tenancy from year to year. I doubt whether it creates even that. In my opinion the words "until further notice" govern all that precedes, and the true meaning of the order is that the party is only appointed till further notice. It seems to me that the Court ought to hesitate very long before deciding that the holder of land under such an arrangement as this is entitled to a vote. It is scarcely possible to imagine an arrangement more dangerous in the way of giving facilities for the manufacture of votes.

---

(1) Law Rep. 4 C. P. 454.

Decision affirmed.

Attorney for appellant: *A. Beddall.*
Attorneys for respondent: *Corser & Fowler.*

1871
Nov. 21.

WADMORE, Appellant; DEAR, Respondent.
WADMORE, Appellant; ARIES, Respondent.

Parliament—County Vote—Shares in Bridge—Right to Tolls—"Tenement" within 8 *Hen.* 6, *c.* 7.

In 1724, an Act (12 Geo. 1, c. 36) passed for the purpose of enabling certain "commissioners and trustees" to erect a bridge across the Thames between Fulham and Putney. By that Act provision was made for incorporating the commissioners and trustees, so as to enable them to purchase land and to sell or assign the same at their pleasure (but no incorporation took place); and they were impowered to levy a pontage or toll for passage over the bridge, and they or any eleven or more of them (when incorporated) were authorized to convey *the toll* so granted by the Act, by indenture under their common seal, by way of security for money borrowed by them for the purposes of the Act.

In 1728, another Act (1 Geo. 2, c. 18) was passed to explain and amend the former Act. By s. 1 it was enacted that the commissioners and trustees, or any nine or more of them, and the commissioners and trustees "when incorporated in pursuance of the former Act," might contract with any person or persons to erect and repair the bridge; and by s. 3 the commissioners and trustees, or any nine or more of them, before incorporation, and the corporation when created, were impowered to convey over in perpetuity or otherwise, "all or any toll, revenues, profits, or incomes of or belonging to the bridge," to such persons as would undertake to erect the same; and by s. 5 it was enacted that, when the purchase-money provided by the first Act should be paid to the proprietors of certain then-existing ferries, "the said ferries and passage over the river, and the ground and soil adjacent and belonging to the respective ferries, should be transferred to and absolutely vested in the commissioners and trustees.

In November, 1728, the commissioners contracted with thirty persons who had each subscribed 1000*l.* to make the required payments and build the bridge, and by indentures, reciting the various provisions of the Acts, they granted and assigned to trustees for the thirty subscribers "the said bridge, and all the materials wherewith the same was built, and all tolls, revenues, profits, and incomes of or belonging to the said bridge," "with all such ground and soil adjacent and belonging to the then late or then present horse-ferries and passage over the river as had been, was, or should be vested in the said commissioners," &c., upon trust to permit and suffer the said thirty persons, their heirs and assigns, to receive the toll and have the sole management and direction thereof, and divide the net proceeds amongst themselves according to their respective rights and interests therein,—to hold as tenants in common.

By the Thames Navigation Act, 1870 (33 & 34 Vict. c. cxlix.), s. 10, subs. 6, it was provided, that "the bridge and the lands thereunto belonging, and the tolls, revenues, profits, and income of or belonging to the same, shall be vested in the committee of management and their successors for the time being, subject to the trusts on which the same are held at the passing of this Act":—

Held, affirming *Tepper* v. *Nichols* (18 C.B. (N. S.) 121; 34 L. J. (C.P.) 61; that the commissioners had no power to convey the bridge and land, but only

& S.C. 11 Jur. N.S. 18

the tolls; and that the holders of shares in the bridge claiming through the thirty subscribers were not owners of a "tenement" within 8 Hen. 6, c. 7, so as to be entitled to a county vote; and that the Thames Navigation Act in no respect altered the nature of the interest which the holders of shares in the bridge had under the former Acts, so as to give them an interest in land which they did not possess before.

APPEALS from the Revising Barristers for the counties of Middlesex and Surrey respectively.

At a court for the revision of the lists of voters for the county of Middlesex, the names of James Foster Wadmore and of twenty-two other persons, who claimed to have their names inserted in the Fulham list, in respect of "Freehold shares in Fulham Bridge," were objected to.

At a court for the revision of the lists of voters for the county of Surrey, the names of James Frederick Wadmore and of thirty-five other persons, who claimed to have their names inserted in the Putney list, in respect of "Freehold shares in Putney Bridge," were objected to. The cases stated were in substance as follows:—(1)

1. In support of the claimants, the following documents and facts were established in evidence:—

2. In or about the year 1724, the Act of 12 Geo. 1, c. 36, was passed, intituled "An Act for building a bridge across the river of Thames, from the town of Fulham, in the county of Middlesex, to the town of Putney, in the county of Surrey."

3. By s. 1 of that Act certain persons were appointed commissioners and trustees for designing, directing, ordering, and building such bridge, and for maintaining, preserving, and supporting the same when built; and they were impowered at any time after the 24th of June, 1726, to design, assign, and lay out how and in what manner the bridge should be made and built from the town of Fulham to the town of Putney aforesaid, and the ways and passages to and from the same, and to preserve and keep in repair

---

(1) The only difference between the two cases was, that the Putney case contained the following additional paragraph:—

"On the 16th of June, 1730, by grant of that date, the Archbishop of Canterbury granted to the proprietors of Putney Bridge two hundred superficial feet of land, part of the churchyard of Putney, for the purpose of making the passage to and from the bridge more commodious; and the same was used for that purpose, and now forms part of the approach to the bridge."

1871

WADMORE v. DEAR.

such ways and passages from time to time, and to make contracts and do all matters and things for carrying on and effecting the purposes aforesaid.

4. And to the end that the navigation of the Thames might receive no prejudice, by s. 2 it was enacted that, when the bridge was built across the river, there should remain free and open passage for the water to flow and re-flow through the arches or passages under the bridge, of 700 feet at least within the then present banks of the river. By s. 5, bodies corporate and others who were seised of ground in Putney or Fulham which might be required for the purpose of making convenient approaches to the bridge, were enabled to convey to the commissioners and trustees, or to any nine or more of them, or their successors, or as they should appoint, any such ground, for the purposes of the Act.

5. By s. 7 it was enacted "That it should be lawful for His Majesty, his heirs and successors, by letters-patent under the great seal, to incorporate all and every the commissioners and trustees appointed by that Act, or who should be appointed pursuant thereto, to be commissioners and trustees for putting the Act into execution, or such of them as should be then living, and such others as His Majesty, his heirs or successors, should think fit, to be one body politic and corporate in deed and in name, and they and their successors to have perpetual succession and a common seal, &c.; and that they and their successors should be able and capable in law to have, purchase, receive, enjoy, possess, and retain, to them and their successors, messuages, lands, &c., and also to sell, grant, demise, alien, or dispose of the same, or any part thereof, at their free wills and pleasures, to sue and implead, be sued and impleaded, answer and be answered in courts of record or elsewhere, and to choose their successors and officers from time to time, and to do and execute all and singular other matters and things that to them should or might appertain to do, with such powers and clauses as should be necessary or requisite for erecting, building, preserving, and supporting the bridge and the ways and passages thereto from time to time."

The commissioners and trustees were never incorporated in pursuance of that Act.

6. By s. 8 it was enacted "that it should not be lawful to or for

the corporation or company which should or might be erected or established by virtue of or pursuant to that Act, as such corporation or company, to borrow or take up or give security for any sum or sums of money payable in less than six months, or to discount any bills of exchange or other bills or notes whatsoever, or to keep any books or cash of or for any person or persons, bodies politic or corporate whatsoever, other than and except only the proper books, moneys, and cash of the said company or corporation."

7. By s. 10 it was enacted that certain pontage or toll should be paid before any passage over the bridge should be permitted, and that such pontage or toll should be vested in the commissioners, to be by them applied, in accordance with the provisions of the Act, towards the expenses of making and maintaining the bridge, ways, and passages, and purchasing the necessary ground for the same.

8. By s. 13 the commissioners or any eleven or more of them, were impowered, when incorporated, by indenture in writing under their common seal, to convey and assure the toll by that Act granted, or any part thereof, as a security for any sum or sums of money by them to be borrowed for the purposes of the Act, and to grant any annuities for one, two, or three lives, or for twenty-one years, or a less term; such annuities to be chargeable upon and payable out of the tolls, estates, and revenues belonging to such corporation.

By s. 14 it was enacted that such annuities should be personal estate.

9. By s. 16 it was enacted that it should be lawful for the commissioners and their successors, and for such intended company or corporation, and their agents and officers, from time to time to remove any shelfs in the Thames, and to make the river deeper.

10. By s. 17 it was enacted that all stones, bricks, planks, piles, and other materials which should be made use of for or towards building or making the bridge, or in or about the same, or for maintaining, repairing, or supporting the same, or for making the river deeper as aforesaid, should always be deemed to belong to the commissioners and corporation. And by s. 18 it was provided that, if the bridge should at any time become damaged, it should be lawful for the commissioners or corporation to set up ferries

across the river near to the bridge, and to take certain rates and duties for passage by such ferries over the same.

11. By s. 19 it was enacted that it should not be lawful to erect or build the bridge, or any part thereof, before or until full and ample satisfaction was made for all such prejudice, loss, or damage as should or might be sustained or suffered by any of the owners, proprietors, lessees, or others having any property or interest in the then horse or foot ferries between Fulham and Putney.

12. By s. 22 it was enacted that nothing in that Act contained should extend or be construed to extend to prejudice or take away any right, property, or jurisdiction of the Mayor, &c., of London to, in, and upon the river Thames, other than and except to remove any shelf or to deepen or widen the river where the bridge should be built, and to do every other matter and thing as should be necessary for the erecting and maintaining the bridge.

13. By 1 Geo. 2, c. 18, for explaining and amending the Act above referred to, it was by s. 1 enacted that the commissioners and trustees appointed by the recited Act and those appointed by this Act, or any nine or more of them, and the commissioners and trustees, when incorporated in pursuance of the former Act, should have full power and authority to contract and agree with any person or persons, &c., to erect and build a bridge across the Thames from Fulham to Putney, and repair the same when built, in such manner as by the commissioners and trustees or corporation aforesaid, or any nine or more of the said commissioners and trustees, should be judged proper; and the said commissioners and trustees, or corporation aforesaid, or any nine or more of the said commissioners and trustees before such incorporation, had thereby power and authority to grant any annuity or annuities in fee out of the profits, incomes, revenues, or tolls of the bridge, in such manner as they might by the former Act grant any other annuity or annuities; all which annuities in fee to be granted pursuant to that Act should be registered, and should be assignable and devisable as the other annuities were by the former Act; and such annuities in fee should be deemed personal estate.

14. And for the more effectually enabling the commissioners and trustees and corporation aforesaid as speedily as might be to complete and perfect the work, by s. 3 it was enacted that it should

be lawful for the commissioners and trustees, or any nine or more of them, before incorporated, and also lawful for such corporation when created, at any time or times to convey over in perpetuity or otherwise all or any tolls, revenues, profits, or incomes of or belonging to the said bridge or ferries, or which should in any wise arise, accrue, or belong to the same, unto such person or persons as would undertake, contract, and agree to erect and build the bridge, and to keep up the same in good and sufficient repair, and should give sufficient security so to do to the satisfaction of the commissioners and trustees and corporation, anything therein or in the former Act to the contrary notwithstanding.

15. By s. 5 it was enacted that it should not be lawful for the commissioners and trustees, or corporation, to erect or build the bridge, or any part thereof, before or until full and ample satisfaction was made for all such prejudice, loss, or damage as might be sustained by any of the proprietors of the horse ferries between the towns of Putney and Fulham, unless the proprietors of the said horse ferries, by writing under their respective hands and seals, should consent and agree with the commissioners and trustees, or any nine or more of them, or the corporation, to permit the commissioners and trustees or corporation to build the same before such satisfaction should be made; and in case such consent of the said proprietors should be had and obtained in manner aforesaid, that then the bridge when built, and all tolls, revenues, profits, and incomes belonging or to belong to the same, should be and were thereby made chargeable and charged in the first place with all such sums of money as were by the former Act to be paid to the respective owners, proprietors, and persons interested in the then ferries between Fulham and Putney; and that, upon payment thereof respectively, or tender and refusal, all ownerships, properties, and interests of, in, or to the horse and foot ferries between Fulham and Putney should be and were thereby extinguished and determined, and the said ferries and passage over the river Thames there, and the ground and soil adjacent and belonging to the respective ferries should be and were by the authority of that Act transferred to and absolutely vested in the commissioners and trustees and corporation aforesaid and their successors and assigns for ever.

All such moneys and payments for the said horse ferries have long since been duly made and paid by the thirty persons who as hereinafter is mentioned contracted with the commissioners and trustees of the Acts for the building of the bridge.

16. Copies of the Acts referred to accompanied the case.

17. The ferries referred to in the Acts, on the Putney side of the river, were held and were parcel of the manor of Wimbledon, and on the Fulham side were held and were parcel of the manor of Fulham; and previously to the 21st of March, 1728, Daniel Pettiward and William Skelton had been respectively admitted to, and each of them then held in fee by copy of court-roll of the respective manors, one undivided moiety of the ferries on both the Putney and Fulham sides of the river; and on the 21st of March, 1728, the sum of 8000*l.* was paid by the said thirty persons who had so as aforesaid contracted for the building of the bridge to Pettiward and Skelton in full satisfaction for all damage which they or either of them should sustain by occasion of building the bridge; the rights and interests of all other parties in the said ferries having been previously satisfied as is herein mentioned.

18. On the 19th of November, 1728, a contract was duly entered into by the commissioners with thirty persons who had subscribed 1000*l.* each for building the bridge and making the purchases and payments required by the Acts, by which those thirty persons contracted to build and maintain the bridge and the ways and passages thereto, and make the said purchases and payments; and in pursuance thereof the said thirty persons did build the bridge and make the said payments and purchases.

19. By indentures of bargain and sale bearing date the 11th of November, 1729, duly inrolled in Chancery, made between the commissioners of the first part, the said thirty persons, therein named and described as being all the contractors and subscribers for building the bridge, of the second part, and certain other persons as trustees of the third part,—after reciting the 1st, 2nd, 3rd, 7th, 10th, 11th, 12th, 16th, 17th, 18th and 19th sections of the Act first above mentioned and the 1st, 3rd, and 5th sections of the Act secondly above mentioned; and further reciting the contract of the 19th of November, 1728, and that the thirty persons had paid all moneys they had agreed to pay, and built the bridge, the

commissioners granted, bargained, sold, assigned, and set over unto the persons parties thereto of the third part, their heirs and assigns for ever, *the said bridge and all the materials wherewith the same was erected and built, and all tolls, revenues, profits, and incomes of or belonging to the said bridge so built* from Fulham to Putney, or the ferries thereafter to be set up and erected as occasion might be, according to the provision in that behalf made by the recited Acts or either of them, or which should in any wise arise, accrue, or belong to the same, *with all such ground and soil adjacent and belonging to the then late or then present horse ferries and passage over the river between Fulham and Putney as had been, was, or should be vested in the said commissioners,* and all benefits advantages, powers, privileges, and authorities, and every other matter and thing whatsoever vested in or granted to the said commissioners which they were impowered or capable to assign and convey over by virtue of the said Acts or either of them—to hold the same unto and to the use of the trustees, parties thereto of the third part, their heirs and assigns for ever, upon trust to permit and suffer the said thirty persons therein named of the second part, their heirs and assigns, to receive and take the said tolls, revenues, profits, and income, and to have the sole management and direction thereof, upon condition that they should thereout pay certain sums of money and expenses specified in the said deed (which condition has been duly performed), and, after payment of such sums of money, should every year thereafter divide all the then rest and residue of the moneys to be raised by the said tolls, revenues, profits, and income of the said bridge, ferries, and other the premises (if any) unto and amongst the said thirty subscribers and proprietors for the time being, and their respective heirs and assigns, rateably and proportionally according to the several sums of money by them subscribed for the purposes aforesaid, and to their several and respective rights, shares, and interests of, in, and to the same, to have, hold, and enjoy the same as tenants in common, and not as joint-tenants.

20. And by the same deed it was provided that, in case the tolls, revenues, profits, and incomes of the bridge or ferries should at any time or times thereafter fall short and not be sufficient to answer and make good all such sums of money as should be requi-

site for putting and keeping the bridge, together with the ways and passages to and from the same, in good repair within a reasonable time to be allowed for making such repairs, or should not be sufficient for the payment of all the matters and things thereinbefore particularly mentioned, and the charges of the trustees in the execution of the trusts, then all such sums of money as should so fall short or be wanting for the said purposes should from time to time be paid and borne by the said thirty subscribers, parties thereto of the second part, their heirs and assigns, rateably and proportionally and according to the several sums of money subscribed by them respectively towards the purposes aforesaid, and to their several rights, shares, and interests therein.

21. There is no other land (1) vested in or belonging to or claimed by the proprietors of the bridge except what is comprised in the before-stated deed of the 11th of November, 1729; and no evidence was adduced before the revising barrister as to the annual value of or income arising from the said land separate and apart from the income derived and arising from the bridge and land together; which last-mentioned income in the shape of tolls revenues, profits, and income, is sufficient to give each of the claimants in this case an income of more than 40*s.* per annum.

22. The interest of the present proprietors in the bridge is derived from and through the thirty persons parties to the deed of the 11th of November, 1729, of the second part, and is identical in all respects with the interests of the said thirty persons under and by virtue of that deed, save in so far as the same may have been affected or altered or modified or enlarged by the provisions of the Thames Navigation Act, 1870 (33 & 34 Vict. c. cxlix); and such interest has always been conveyed and transmitted as and dealt with as freehold estate: and the shareholders or proprietors in the bridge are at present about 100 in number.

23. The proprietors meet once a year, and select a committee of management of six out of their own body to manage their affairs.

24. The persons objected to are respectively the holders of a share or part of a share of such interest as aforesaid; and the

---

(1) Except as stated, ante p. 213.

sufficiency of the annual money value of such share or part of a share is not now in dispute.

25. The bridge is built partly upon piles driven into the bed of the river, and at either end upon brick foundations which stand respectively upon that part of the banks between high and low water mark, whence formerly the ferries used to ply from side to side, and in part upon land which formerly was ground and soil adjacent and belonging to the ferries.

26. There are toll-houses at each end of the bridge, at which tolls are collected, and each of them is a structure of brick, and stands upon the brick foundations of the bridge, referred to in the last paragraph.

27. By an Act passed in the 33 & 34 Vict. (c. cxlix), the Thames Navigation Act, 1870,—reciting amongst other things that it was expedient that provision be made for the improvement of Putney Bridge,—it was by s. 10 enacted that, " with respect to the improvement and management of the bridge across the Thames between Fulham and Putney (in this section referred to as Putney Bridge), the following provisions shall have effect, viz.:—

"(6) The improvements of Putney Bridge authorized by this section, and the bridge and the lands thereunto belonging, and the tolls, revenues, profits, and income of or belonging to the same, shall be vested in the committee of management and their successors for the time being, subject to the trusts on which the same are held at the passing of this Act:"

And by sect. 11 of the Act it was enacted that " the conservators on the one hand, and the proprietors of the bridge on the other hand, may from time to time enter into and carry into effect such agreements as they think fit relative to the alteration, raising, lowering, removal, or rebuilding wholly or in part of Putney Bridge, and relative to any contribution to be made by the proprietors of Putney Bridge to the expenses of any such works, and to the raising of money by the proprietors of Putney Bridge for the purposes of any such works or contribution; and every such agreement shall have the like effect as if it were in terms contained in and enacted by this Act, and shall be binding on and enforceable against the conservators and the proprietors of Putney Bridge, party thereto respectively."

28. For the persons objected to it was contended that, notwithstanding the decision of this Court in the case of *Tepper* v. *Nichols* (1), and under and by virtue of the Acts of Parliament, and particularly under and by virtue of the Thames Navigation Act, 1870, and of the deed of bargain and sale of the 11th of November, 1729, referred to in par. 19, they had respectively such freehold estates in the bridge, tolls, and other property comprised in the said Acts and deed, as entitled them respectively to be on the list of voters for the county.

29. For the objector, it was contended that the said persons had not respectively such freehold estates as would entitle them to vote for the county; and also that the shareholders were a company or corporation, or quasi corporation, and that the individual shareholders, being only entitled to a share of the receipts and profits, were not entitled to be on the list of voters.

30. The revising barristers decided that having regard to the decision of this Court in *Tepper* v. *Nichols* (1), the several persons objected to had not, notwithstanding the provisions of the Thames Conservancy Act, 1870, such freehold estates as entitled them to be on the list; and accordingly disallowed the claims.

If the Court should be of opinion that the decisions were wrong, the names of the persons objected to were to be inserted on the registers for the parishes of Fulham and of Putney respectively.

Edward Clarke, for the appellants. The contention on the part of the respondents in *Tepper* v. *Nichols* (1) was,—1, That no interest in land passed to the commissioners; 2, that, if it had, they had not conveyed it to the trustees by the indentures of November, 1729; 3, that all that the shareholders were entitled to was a participation in the profits arising from the tolls. The second point only was decided. Erle, C.J., in giving judgment, says (2): "If the commissioners had power to part with any land vested in them by the Acts or either of them, no doubt the shareholders would take an equitable interest under that conveyance. But I take it to be perfectly clear law, that, where an Act of Parliament vests land in commissioners for public purposes, unless there be some special authority to that effect in the Act, they have no power to part

(1) 18 C. B. (N.S.) 121; 34 L. J. (C.P.) 61.
11 Jur NS. 18.

(2) 18 C. B. (N.S.) at p. 140.
11 Jur NS. 20

with the land. I see nothing here to warrant the commissioners in conveying any land." The new Act of 1870, s. 10, subs. 6, has vested "the bridge and the lands thereunto belonging" in the trustees, or "committee of management," as they are now called, for the benefit of the shareholders; and thus the title to the land and the tolls has become united.

[WILLES, J. The effect of that enactment is, that what before was in the trustees shall now be in the committee of management; no more. It alters the succession, but not the property. The committee of management are made a corporation by force of the words "and their successors."]

Sect. 11 of the Act recognizes "the proprietors of the bridge" as a body distinct from the committee of management. It cannot be disputed that tolls arising out of land would constitute a tenement within 8 Hen. 6, c. 7, so as to give those entitled to receive them a vote. In *Rex* v. *Barnes* (1), an occupation of land similar to that in this case was held to render the proprietors of a bridge liable to be rated to the relief of the poor in the respective parishes in which the abutments lay.

[WILLES, J., referred to *Stracey* v. *Nelson.* (2)]

M'Intyre, for the respondents. The claimants are not entitled to any freehold interest. By the Act of 1870, the bridge and the lands thereunto belonging, together with the tolls, are vested in "the committee of management and their successors," subject to the trusts on which the same were held at the passing of the Act. That leaves the appellants precisely as they stood when the decision in *Tepper* v. *Nichols* (3) was pronounced.

Clarke, was heard in reply.

WILLES, J. If this case were to rest upon the law as it stood at the time of the decision of *Tepper* v. *Nichols* (3) in 1864, there could be no doubt that the claims to vote ought to be rejected. There is the express decision of this Court, which is quite intelligible, in this sense, viz. that the Court did not mean to decide that tolls could not be considered a freehold tenement within the statute 8 Hen. 6, c. 7, but only that tolls of the par-

(1) 1 B. & Ad. 113. (2) 12 M. & W. 535.
(3) 18 C. B. (N.S.) 121; 34 L. J. (C.P.) 61. 11 Jur. N.S. 10.

1871

WADMORE v. DEAR.

ticular description stated in that case, not having any existence at common law, were not a "tenement" within that statute. At the common law, it should seem, toll for a passage over a bridge put in the place of an ancient ferry, must be treated either as toll traverse or toll thorough. In respect of toll thorough,—which is a payment for the right to pass over land not in the ownership of the person claiming the toll,—it was necessary to prove some consideration for it; and here it is not suggested that there exists any consideration. In respect of the other sort of toll, toll traverse, it was not necessary to prove any special consideration for it, because the passage over the land of an individual implied a consideration; and therefore, though it is unnecessary for the decision of this case to consider what is a "tenement" within 8 Hen. 6, c. 7, I am ready to hold that tolls may come within the terms used in that statute, which terms are expressed principally with respect to land, "free lands or tenements." I can well understand that "tenement" may embrace a variety of franchises unconnected with possession of land,—a fishery, for instance: so of tolls which were in existence at the time of the passing of the statute of Hen. 6. There may, however, have been tenements created since the passing of the Act, —tenements created by Act of Parliament. But no new tenement within that Act could be created by a mere conveyance. A pew in a church, granted to a man and his heirs and assigns for ever, might in one sense be a "tenement:" but such a tenement, though created by Act of Parliament, has been held by this Court not to be such a tenement as will confer a vote within 8 Hen. 6, c. 7, because not a tenement existing at the time of the passing of that Act: see *Hinde* v. *Chorlton* (1), and *Brumfitt* v. *Roberts.* (2) So, I presume, the distinction was taken in *Tepper* v. *Nichols* (3) between a trust to pay out of the profits of land and a right to levy tolls for the benefit of persons who took them apart from any right or interest in the land itself. It must, I think, be assumed that the Court in that case decided that the sort of tolls created by the Act of Parliament did not constitute a "tenement" within 8 Hen. 6, c. 7, but a new sort of tenement; and that it was not intended to give indirectly the parliamentary franchise in an Act of Parliament

(1) Law Rep. 2 C. P. 104. (2) Law Rep. 5 C. P. 224.

(3) 18 C. B. (N.S.) 121; 34 L. J. (C.P.) 61. 11 Jur NS

1871

WADMORE
v.
DEAR.

which had nothing whatever to do with parliamentary franchises, the object being merely the substitution of a bridge for a ferry. That to my mind explains the decision in *Tepper* v. *Nichols.* (1) The tolls could only give the franchise in respect of their representing the profits of the land. Apply that here. The Act of 1 Geo. 2, c. 18, appointed commissioners, and (by s. 3) authorized them to assign the tolls which they were impowered by 12 Geo. 1, c. 36, s. 10, to levy for passage over the bridge to be erected, "in perpetuity or otherwise," to the persons who should undertake to build and sustain the bridge. Professing to act in exercise of the power thus conferred upon them, the commissioners by indenture of the 11th of November, 1729, conveyed to trustees for the thirty persons who had contracted to build the bridge, not the tolls only, but the bridge itself, with all such ground and soil adjacent and belonging to the ancient ferries as had been or should be vested in them the commissioners. This Court held in *Tepper* v. *Nichols* (1) that the commissioners had no authority by the Act to convey the land, but only to convey a property in the tolls, and consequently the persons for whose benefit the conveyance was made had not such a tenement within 8 Hen. 6, c. 7, as to give them a right to vote. That is the explanation of *Tepper* v. *Nichols* (1); and I do not wish to express any disagreement with the decision.

That being established, matters stand thus:—The commissioners having the land (assuming that they had the land vested in them), with authority to convey the tolls, have conveyed them to the persons who claim the right to vote, but not in such a manner as to give them that right; the Thames Navigation Act, 1870, is passed, by s. 10, subs. 6, of which it is provided that "the bridge and the lands thereunto belonging, and the tolls, revenues, profits, and income of or belonging to the same, shall be vested in the committee of management and their successors for the time being, *subject to the trusts on which the same are held at the passing of this Act.*" Unquestionably the tolls were at that time held by the trustees upon trusts giving the claimants a right to participate in the profits of the bridge; but it is equally clear that the land was held in trust for the general purposes of the bridge; and in no sense was the bridge held in trust for the persons now claiming the

---

(1) 18 C. B. (N.S.) 121; 34 L. J. (C.P.) 61. 11 Jur NS 818

1871

WADMORE v. DEAR.

right to vote. The provision in the Act is to be read as rendering the trusts applicable to the two species of property. For general convenience, the property, as well in the land as in the tolls, is vested in the committee of management in a corporate capacity, but upon trusts applicable to each as they were applicable before the passing of the Act. The claimants, therefore, are no better off in respect of the franchise than they were in 1864, when the decision of this Court in *Tepper* v. *Nichols* (1) took place. It is clear, therefore, that the votes were properly rejected.

KEATING, J. I am of the same opinion. The 10th section, subs. 6, of the Thames Navigation Act, 1870, does appear to vest the land as well as the tolls in the committee of management as a corporation, but most clearly it is subject to the trusts on which the same were held at the passing of this Act. The effect of those trusts has already been adjudicated upon in *Tepper* v. *Nichols* (1), from which I see no reason to differ. The shareholders have acquired no additional rights under the later Act.

BRETT, J., concurred.

WILLES, J., referred in addition to the case of *Lambert* v. *Mayor of Nottingham*. (2)

Decisions affirmed.

Attorney for appellants: *Evan Hare.*
Attorney for respondents: *W. Gardiner.*

(1) 18 C. B. (N.S.) 121; 34 L. J. (C.P.) 61.
11 Jur. N.S. 18.

(2) Willes, 111.

CULL, Appellant; AUSTIN, Respondent.
AUSTIN, Appellant; CULL, Respondent.

1872
June 3.

9QB284-
290382

Parliament—Borough Vote—Payment of Rates—30 & 31 *Vict. c.* 102, *s.* 3, *subs.* 4—*Payment excused by Reason of Poverty*—54 *Geo.* 3, *c.* 170, *s.* 11.

The rates, which,—under s. 3 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), and the prior and subsequent enactments which are to be construed with it, it is necessary that an inhabitant occupier should have paid before the 20th of July of the qualifying year,—are, only the rates made and allowed after the 5th of January of the year preceding the qualifying year, and payable up to the 5th of January of the qualifying year; and the excusal of such rates, whether made before or after the commencement of the qualifying year, does not prevent a disqualification arising from their not having been paid or tendered before the 20th of July of the qualifying year.

Abel v. *Lee* (Law Rep. 6 C. P. 365) explained.

Appeals from the Revising Barrister for the borough of Cheltenham.

Cull *v.* Austin.

Thomas Cull objected to the name of Thomas Best on the list of voters for the parish of Cheltenham.

Best was duly qualified under the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 3, unless he failed to be qualified, under the following facts.

On the 2nd of February, 1867,—before the passing of the Representation of the People Act, 1867,—a poor-rate was duly made and allowed by the justices, for the parish of Cheltenham, to which rate Best was duly rated in respect of the qualifying premises, and the amount of which on the making and allowance became payable from him; but Best had not either before or since the 20th of July last past paid the amount, or any part of it.

It appeared, on inspection of the rate-book, that Best had been excused by order of the justices from payment of the rate; but it did not appear that Best had ever made any personal or other application to be so excused.

It was proved that the custom of the parish was for the assistant overseer, shortly before the close of each rate, to enter in column 17 of the rate-book, headed "legally excused," the rates of all such persons as, in his opinion, were by reason of their

1872

CULL v. AUSTIN. AUSTIN v. CULL.

poverty unable to pay the rate; and the rate-book was then taken before the justices at their next petty sessions, and the justices, on the application of the assistant overseer, then entered at the end of the rate-book the following minute, and duly signed the same:—"We, the undersigned, two of Her Majesty's justices of the peace acting in and for the county of Gloucester, do hereby, with the consent of the churchwardens and overseers of the poor of the parish of Cheltenham, order and direct that the persons whose amount of rates appear in column 17 shall be excused from the payment of the rate." In this way only was Best excused the rate of the 2nd of February, 1867.

The next following rate was made on the 25th of July, 1867, also before the passing of the Representation of the People Act, 1867, and before the commencement of the first qualifying year in that Act defined; and Best had duly paid that rate and also all rates subsequently made in respect of the qualifying premises.

The rate of the 2nd of February, 1867, was shortly after it became payable duly demanded of Best by a demand-note duly served upon him: and Best had continuously occupied the same qualifying premises from before the 2nd of February, 1867, up to the present time.

It was contended, in support of the objection, that, it having been proved that Best had not on or before the 20th of July last paid the amount rated on him by the rate of the 2nd of February, 1867, he had not bonâ fide paid an equal amount in the pound to that payable by other ordinary occupiers, in respect of all poor-rates which had been payable by him up to the 5th of January last, in respect of the premises which formed his qualification. But, inasmuch as the rate was made and allowed before the passing of the Representation of the People Act, 1867, under the provisions of which Act Best proved his qualification to be registered as a voter, the revising barrister overruled the objection, and retained the name of Best on the list of voters.

The questions for the Court were:—1. Whether by such non-payment of the poor-rate of the 2nd of February, 1867, as above-stated,—a poor-rate which had ceased to be in force before the passing of the Representation of the People Act, 1867, and before the commencement of the first qualifying year in that Act defined,

—Best (who had proved his qualification under the provisions of that Act) would be disqualified from being retained on the list of voters: 2. If so, whether the excuse by the justices would prevent that non-payment from operating to his disqualification.

AUSTIN *v.* CULL.

The name of Henry Compton, on the same list of voters, was objected to.

His qualification was duly proved in all other respects, except as follows:—

Compton had duly paid, within the qualifying year, all the poor-rates which had become payable by him during the qualifying year in respect of the qualifying premises; but he had not paid, either before or since the 20th of July last past, two previous rates of the 30th of April and 30th of October, 1869, to each of which rates he was duly rated in respect of the qualifying premises, and the amount of each of which rates had, on the making and allowance thereof respectively, become payable and had been demanded from him.

Compton had been excused by the justices from the payment of the above rates under precisely similar circumstances to those of the preceding case.

Compton had continuously occupied the same qualifying premises from before the 30th of April, 1869, up to the present time.

It was contended on behalf of the objector that Compton had not, on or before the 20th of July last, bonâ fide paid an equal amount in the pound to that payable by other ordinary occupiers, in respect of all poor-rates which had become payable by him up to the 5th of January last in respect of the premises which formed his qualification, two of such rates having been wholly unpaid.

The revising barrister accordingly struck his name from the list, subject to the opinion of the Court.

The questions were:—1. Whether, by such non-payment of poor-rates, Compton was disqualified as a voter: 2. Whether such excuse by the justices would prevent that non-payment from operating to his disqualification.

Nov. 18. *Anstie* (*H. B. Armstrong* with him), for the appellant in

1872

CULL v. AUSTIN. AUSTIN v. CULL.

the first case, and the respondent in the second. The name of Best was improperly retained in the list, and that of Compton properly struck out. The question turns upon s. 3, subs. 4, of the Representation of the People Act, 1867 (30 & 31 Vict. c 102), which enacts that, to entitle an occupier to be registered as a voter he must, on or before the 20th of July in the same year, have bonâ fide "paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor-rates that have become payable by him in respect of the premises up to the preceding 5th of January." In Best's case, the rate was made on the 2nd of February, 1867 (which was before the passing of the Representation of the People Act, 1867), and in Compton's case the rates were made on the 30th of April and 30th of October, 1869, respectively; and each continued to occupy the same premises. The non-payment of those rates clearly disqualified them from being on the register. In the first place, the excusal of the rate by the justices was not a valid excusal under 54 Geo. 3, c. 170, s. 11 (1), inasmuch as there was no application by the parties themselves to be relieved from the payment, and no proof of inability, or consent of the overseers, but a spontaneous application by the assistant-overseer, which might have been a hostile act on his part.

[BRETT, J. The power to tender the rate is expressly given to prevent any hostile action of the overseers.]

Whether the excusal was valid or not, the parties are disqualified. In *Abel* v. *Lee* (2), the claimant was validly excused during the qualifying year. It was there contended that excusal was equivalent to payment. But Bovill, C.J., said (1): "It seems to me to be manifest that the legislature [by s. 27 of the Reform Act, 2 Wm. 4, c. 45,] intended that all rates and taxes, whether imposed during the qualifying year or not, should have been paid before the time specified, in order to secure the franchise; and I think that, with respect to poor-rates, the same construction ought to be put upon the corresponding provision in s. 3 of the Representation of the People Act, 1867." Willes, J., concurs; but he goes on to say (2): "The 11th section of 54 Geo. 3, c. 170, can only come into operation on the application of the party himself. Assuming that the appellant is in the condition of not being able ever to vote in respect of the house he occupies, by reason of this particular rate remaining unpaid, it must be remembered that he is brought into that position by his own voluntary act, and not by the act of the legislature." The hardship suggested, of perpetual disfranchisement, is more apparent than real, because the parties may always upon a change of residence re-acquire the franchise.

---

(1) Which enacts that "it shall and may be lawful for any two or more of His Majesty's justices of the peace acting for the county, &c., in which any parish, &c., shall be situated, in petty sessions assembled, on application made to them by any person rated to any rates or cesses within any such parish, &c., to be discharged therefrom, and proof of his or her inability through poverty to pay such rate or cess, with the consent of the churchwardens and overseers of such parish, &c., to order and direct that such person shall be excused from the payment of such rate or cess, and to strike his or her name therefrom; and the sum at which such person was so rated in such rate or cess shall not thereafter be collected, or any person or persons charged therewith, or in any manner called or liable to account for the same, or for omitting to collect or receive the same."

(2) Law Rep. 6 C. P. 365.

[KEATING, J., referred to Elliot on Registration, 2nd ed. 191, where, observing upon s. 27 of 2 Wm. 4, c. 45, it is said: "This provision as to rates being quite general in its terms, it was held by some revising barristers that any arrear of rate, however distant the period might be at which it became payable, if left unpaid on the 20th day of July in the year of registration, had the effect of disqualifying the voter, although the statute only required him to be *rated* in respect of the premises for one year. It will be seen by reference to the statute of 6 Vict. c. 18, s. 75, that it will now be sufficient if the person seeking to be registered has paid all rates which have become due from him in respect of the qualifying property for one year previous to the 6th of April then next preceding."

BRETT, J. All the rates the voter is bound to pay are the rates payable within the qualifying year.]

Abel v. *Lee* (3) shews that all arrears are payable within the year. Once payable, the rate never ceases to be so until it is paid or validly excused. There are no words in s. 3 of the Representa-

---

(1) Law Rep. 6 C. P., at p. 369.
(2) Law Rep. 6 C. P., at p. 372.
(3) Law Rep. 6 C. P. 365.

1872

Cull v. Austin. Austin v. Cull.

tion of the People Act to confine it to rates made after the passing of that Act.

[Brett, J. Sect. 7 and the complicated provisions therein seem to deal with rates made before the Act: see *Stamper v. Sunderland.* (1)]

Notwithstanding the excusal, the rates in question were payable and had not been paid. They might have been paid, or at all events they might have been tendered.

Bosanquet, contrà. The voters had complied with the requirements of s. 3, subs. 4 of the Representation of the People Act, 1867. No reliance is placed upon any distinction between rates made before and those made after the passing of that Act. The general object of the legislature in that section is pointed out by Brett, J., in *Abel* v. *Lee.* (2) "The whole spirit of the legislation on the subject shews that the claimant was bound to pay all the rates *which had become payable by him* in respect of the premises occupied by him, and that the non-payment operated a disqualification." If the argument on the other side be correct, this absurd consequence would follow, that, if in any past year one-half of the householders in a borough were so poor as to obtain parochial relief, they would lose the franchise for that year but for that year only; whereas, if the other half, not being quite so destitute, were only excused from payment of a single rate under 54 Geo. 3, c. 170, s. 11, they would be for ever disfranchised, so long as they continued to occupy the same premises. The Court will presume that the justices rightly excused these persons; it was not necessary to prove before the revising barrister that the required steps were duly taken to put them in motion. Enough is stated to shew that the application was made on their behalf. It is true their names are not struck out of the rate; but the rate was marked "excused," which was practically striking them out. Being excused, they were "not to be called upon or liable to pay" the rate. They had, therefore, paid all rates which had become payable by them up to the 5th of January of the qualifying year.

[Brett, J. The Chief Justice, in *Abel* v. *Lee* (3), relies upon s. 28 of the Representation of the People Act, 1867, to shew that his construction of s. 3 was correct. That section is directory only. Although excused under 54 Geo. 3, c. 170, it may well be that, when he claims to vote, the party must shew that he has paid an equal amount in the pound to that paid by other ordinary occupiers.]

---

(1) Law Rep. 3 C. P. 388.

(2) Law Rep. 6 C. P., at p. 375.

(3) Law Rep. 6 C. P., at p. 369.

Anstie was heard in reply.

Cur. adv. vult.

June 3. The judgment of the Court (Willes, Keating, and Brett, JJ.) was delivered by

BRETT, J. In these cases the name of the proposed voters appeared on the list of voters to be revised in October, 1871, as being entitled to vote for the borough of Cheltenham, and were duly objected to.

The qualification was admitted to be duly proved in all other respects; but it was proved that, although the voters had duly paid all the poor-rates which had become payable by them during the qualifying year in respect of the qualifying premises, yet in the one case the voter had not paid a previous rate of February, 1867, and in the other case he had not paid two previous rates of April and October of the year 1869, to each of which rates he was duly rated in respect of the qualifying premises, and the amount of which rates had become payable by him in respect of such premises.

On inspection of the rate-books for 1867 and 1869, it appeared that the voter in the one case had been excused by order of justices from payment of the rate of February, 1867, and the voter in the other case had in like manner been excused from payment of the rates for 1869; but it did not appear that in either case the voter had made personal or other application to be so excused. It was proved that the custom of the parish was for the assistant overseer to enter into the column of the rate-book headed "Legally excused," the rates of all such persons as in his opinion were, by reason of their poverty, unable to pay the rates, and the rate-books were then taken before the justices in petty sessions, who, on the application of the assistant overseer, entered in the rate-book a minute purporting to excuse the payment of the rates with the consent of the churchwardens and overseers. In this way the

1872

CULL
v.
AUSTIN.
AUSTIN
v.
CULL.

proposed voter was excused in one case the rate of February, 1867, and in the other case the rates of 1869.

The revising barrister in the one case retained the name on the list, and in the other struck it out.

It was contended on the one side that the vote ought not to be allowed; that, upon the facts stated, it appeared that there had been no legal excusal of payment in the one case of the rate of February, 1867, and in the other case of the rates of 1869, and, if there had, yet that the voter had not paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor-rates which had become payable by him in respect of the qualifying premises, and therefore was not entitled to be registered; and that it made no difference that the rates in question were rates imposed and payable before the qualifying year, nor that they were upon these hypotheses legally excused before the qualifying year. It was contended on the other side, that, upon the facts stated, the Court ought to assume that the excusal by the justices was accompanied by the required formalities, and was valid; that, if it was in the one case no part of the rate of 1867, and in the other case no part of the rates of 1869, was now payable by the voter; that no part had been payable by him during the qualifying year; that, consequently, this case was to be distinguished from the case of *Abel* v. *Lee* (1); and that, inasmuch as the voter had paid all rates payable by him in respect of the qualifying premises during the qualifying year, his name was to be retained on the list.

The decision depends upon what is the correct construction of s. 3 of the statute 30 & 31 Vict. c. 102. The first question seems to be what is the rule of construction to be applied.

9 CP 299

The governing rule with regard to the construction of all statutes by a Court of law administering the law, is, that the Court is bound to construe them as nearly as possible according to the ordinary received meaning of the words and ordinary grammatical construction of the phrases and sentences used in them. The Court ought not in any case to depart from such ordinary sense and ordinary grammatical construction, unless an interpretation according to both or either appears by the context to be contrary to the manifest intention of the legislature. It would seem that this rule should, if possible, be more strictly adhered to with regard to the various clauses of the statute under discussion than with regard to any other; because it must be manifest to any Court in this country that a statute dealing with the matter with which this statute deals must have been discussed and settled in almost every clause by persons having different views of the most earnest kind; and that the best way for the Court to hold a strictly even balance is, to follow as nearly as possible the words used in each clause of every section of the Act.

---

(1) Law Rep. 6 C. P. 365.

Now, by s. 3, the first condition to be fulfilled is, occupation as an inhabitant occupier of a dwelling-house within the borough during the whole of the twelve calendar months preceding the 31st of July. The second condition is, that the proposed voter has, "*during the time of such occupation,*" been rated in respect of the premises so occupied by him to all rates made for the relief of the poor in respect of such premises; that is to say, that he has been rated in respect of the premises so occupied by him to all poor-rates made during the twelve months preceding the 31st of July. The next condition is, that he has paid on or before the 20th of July an equal amount in the pound to that payable by other ordinary occupiers in respect of "*all poor-rates that have become payable by him in respect of the said premises up to the preceding 5th of January.*"

It cannot fail to be seen that there is a grave difference in the wording of this last condition. The words confining the application of the condition to the twelve preceding months are omitted. According to the ordinary sense and grammatical construction of the phrase which describes the last condition, it is applicable, not merely to all rates that have become payable by the proposed voter during or in respect of the twelve calendar months preceding the last 31st of July, but to *all* poor-rates that have become payable by him in respect of the qualifying premises at any time preceding the last 5th day of January. The question is whether there is anything in the context of the 3rd section, or of other parts of the statute, or of the statutes which are to be read as part of this statute, which can authorize the Court to depart from the ordinary sense and grammatical construction of the 4th sub-section as thus stated.

The other parts of this statute which refer to the point in question are s. 28 and the form in sched. E. referred to in that section, and s. 29. The form of words used in s. 28 and in the form in sched. E., so far from being inconsistent with the suggested interpretation of s. 3, are as large as the form of words used in it. They do not in terms describe a poor-rate or rates payable within the preceding twelve months, but any, i.e. every, poor-rate due on the 5th day of January preceding. The list ordained to be made by s. 29 is in terms of a still larger description: it is a list containing the name and abode of every person who shall not have paid, not merely the poor-rates payable in respect of the preceding year, but all poor-rates, and not merely those which shall have become payable from him in respect of the qualifying premises, but of any premises within the parish which he has occupied before the 5th of January then last past.

There is, so far, nothing in the context of the statute 30 & 31 Vict. c. 102 itself to modify the ordinary construction of the 3rd section of the statute. There are, however, some other provisions of the statute which, with reference to the question now before the Court, are of great importance.

By s. 56, "subject to the provisions of this Act, all laws, customs, and enactments now in force conferring any right to vote, or *otherwise relating to the representation*," &c., "shall remain in full force and shall apply as near as circumstances admit to any person hereby authorized to vote." And by s. 59, "This Act, so far as is consistent with the tenor thereof, shall be construed as one with the enactments for the time being in force relating to the representation of the people and with the Registration Acts." And there is a provision relating to this statute contained in 31 & 32 Vict. c. 58 which must also be noticed. By s. 30 it is enacted that "the 30th section of 2 Wm. 4, c. 45, and the 75th section of the principal Act, i.e. of 6 Vict. c. 18, shall apply to all occupiers of premises capable of conferring the franchise for *a county* under the Representation of the People Act, 1867." The importance of these enactments is, that, by incorporating the former statutes with the present, they make them part of the context of the present, and make it necessary to consider whether the larger ordinary meaning of the later statute may not after all require some modification by reason of the context thus introduced. This makes it necessary to consider whether there was in the former statutes any limitation of the number of rates which it was necessary that the proposed voter should have paid.

Now, by s. 27 of 2 Wm. 4, c. 45, the rates which it was necessary that the proposed voter should have paid were, "all the poor-rates and assessed-taxes which shall have become payable from him in respect of such premises previously to the 6th of April then next preceding, i.e. the 6th of April of the qualifying year. The wording is practically quite identical with that used in s. 3 of the Representation of the People Act, 1867. If, then, by the context of the former statutes some modification is to be made of the words used in s. 27, it seems fair and right to say that such context must be used to modify to the same extent the words of s. 3 of the later Act. There is nothing in the subsequent parts of 2 Wm. 4, c. 45, itself to indicate any modification; for, in s. 30 the same language is used as in s. 27. But by the Registration Act (6 Vict. c. 18), s. 11, "overseers on or before the 20th of June shall publish a notice that no person will be entitled to have his name inserted in any list of voters for," &c., "unless he shall pay on or before the 20th day of July then next ensuing all the poor-rates and assessed-taxes *which shall have become payable from him in respect of such premises during the twelve calendar months next before the 6th of April then last past*, i.e. which shall have become payable from the 6th of April of the year preceding the 6th of April of the qualifying year. That certainly would mislead, unless it be taken that the poor-rates which it is necessary according to such notice to pay are those which have become payable after the 6th of April of the year preceding the qualifying year. The inference which any one would be entitled to draw is, that, if he pay those poor-rates which became payable on or after the 6th of April of the preceding year, and has been rated to the poor-rates made after the 31st of July commencing the qualifying year, he will be entitled to be registered. The notice in form E. is only slightly different from the section. It differs by using the phrase "which have become due" instead of "which have become payable." By s. 12, the same limitation

1872

CULL v. AUSTIN.

AUSTIN v. CULL.

in the same terms as to the commencement of the time to be considered is made with regard to the assessed-taxes.

It is necessary, in order to determine the exact position of a voter, to determine the meaning of those phrases. Do they mean all rates and taxes which are *payable or due after* the 6th of April, though *made before* it, or do they mean the rates and taxes which are *made and have become due or payable after* the 6th of April ?

By s. 35, the overseers attending the revising barrister " shall produce at the said court all rates *made* for the relief of the poor of their respective parishes or townships between the 6th day of April in the *year then last past* and the last day of July in *the then present* year." This apparently reduces the rates which are to be brought to the notice of the revising barrister to those which have been *made* and *allowed* after the 6th of April of the year preceding the qualifying year. And, as to the question whether the proposed voter has been rated to the proper rates, inasmuch as the revising barrister would require to see only rates made on or after the 31st of July commencing the qualifying year, it seems to follow that the rates made after the preceding 6th of April and before the 31st of July are laid before him in order that he may see whether they have been paid. Sect. 75 is not so direct, and yet it contains a strong intimation. It gives a description of those persons who shall not be disqualified by being misdescribed in any rate,—in other words, of those persons who but for the misdescription would be entitled to vote. Those persons are described to be such as, being liable to be rated, have been bonâ fide called upon to pay all rates *made* for the relief of the poor in such parish or township during the time of such his occupation (i.e. for twelve months next previous to the last day of July), and such person *shall have bonâ fide paid* on or before the 20th day of July in such year all sums of money which he shall have been called upon to pay as rates in respect of such premises *for one year previously to the 6th day of April then next preceding.*" This, again, confines the rates which it is necessary that the proposed voter should have paid to those commencing within the 6th of April of the year preceding the qualifying year.

One of the dates of the 6th of April mentioned in all these sections, viz. the 6th of April of the qualifying year, has been clearly

1872

CULL
v.
AUSTIN.
AUSTIN
v.
CULL.

altered to the 5th of January by 11 & 12 Vict. c. 90; but the other date of the 6th of April, viz. that of the year preceding the qualifying year, would at first sight seem not to have been altered. The enactment is that no person shall be required, in order to entitle him to have his name inserted, &c., to have paid any poor-rates or assessed-taxes except such as shall have become payable from him previously to the 5th day of January in the same year. That would seem to alter the last-mentioned 6th of April, but not the former one. But by s. 28 of 31 & 32 Vict. c. 58 the overseers of every parish shall produce to the barrister appointed to revise the lists of voters of any county all rates made between the 5th day of January in the year then last past and the last day of July in the then present year. This seems to imply that both dates of the 6th of April are changed to the 5th of January.

These various sections may well be said to indicate that the large words used in s. 27 as to the payment of by-gone rates are to be modified and limited. And, after much consideration, and with much hesitation, we have come to the conclusion that they do indicate that the rates which it is necessary that a proposed voter, under s. 27 of the Reform Act, must have paid, were all those which have been *made and allowed after* the 6th of April of the year preceding the qualifying year; and, since the 11 & 12 Vict. c. 90, after the 5th day of January of the year preceding the qualifying year.

If this be the true construction of s. 27 of the Reform Act, it is so by reason of the context found in the sections which have been alluded to. By s. 30 of 31 & 32 Vict. c. 58, the 75th section of 6 Vict. c. 18 is expressly made applicable to the 12*l.* qualification in counties given by s. ~~5~~ 6 of the Representation of the People Act, 1867. If that section as a context limits the large words used in s. 27 of the Reform Act, it may well be held to limit the same words used with regard to a similar subject-matter in the later Act. If that be so, and if the words in s. 3 be not limited in the same manner, there will be a difference, as to the payment of by-gone rates, between the new and old franchises in boroughs and the new occupation franchises in boroughs and counties. This incongruity can be avoided by holding that by virtue of s. 56 of the new Act the sections in the older Acts which limited the large words of s. 27 of the Reform Act, are made a context to the new Act by which the large words of s. 3 are limited.

We have finally come to the conclusion that those words may not improperly be and ought to be limited; and that the rates which it is necessary that a proposed voter should have paid before the 20th of July of the qualifying year, are, *all rates made and allowed after the 5th day of January of the year preceding the qualifying year, and payable up to the 5th of January of the qualifying year.* As to all such rates, he must have paid them according to the terms of subs. 4, that is to say, he must have paid an equal amount in the pound to that payable by other occupiers in respect of such rates. And no excusal of such rates, whether made before or after the commencement of the qualifying year, can be pleaded in bar of a disqualification arising from their not having in fact been paid or tendered before the 20th of July of the qualifying year.

It was argued that such a decision as that to which we have now arrived would be inconsistent with the decision in *Abel* v. *Lee.* (1) In that case, Abel, the appellant, claimed in 1870 to be placed on the register under s. 3 of the Representation of the People Act, 1867. It was conceded that he was duly qualified in all other respects; but it was objected that he was disqualified by reason of not having paid a rate made in respect of the qualifying premises on the 18th of June, 1869,—made, therefore, before the commencement of the qualifying year. The answer relied on to this objection was, that, after October, 1869, that is to say, during the qualifying year, the payment of this rate was duly excused. The revising barrister disallowed the vote. It was argued on the appeal that the only rates which it was necessary that the proposed voter should have paid, were those *made* and *allowed* within the qualifying year, and that the excusal by magistrates, whenever made, from payment of any rate, relieved the proposed voter from the obligation, as matter of qualification, of having paid such rate. Both of these arguments were overruled by the Court, on the ground of the difference of the words used in the subsections of s. 3, and on the largeness of the words used in subs. 4. Inasmuch as the rate in question, viz. that of June, 1869, was made after the 5th

(1) Law Rep. 6 C. P. 365.

of January of the year preceding the qualifying year, the question under discussion in the present case was not raised in that case. The expressions of the judges were pointed to the argument that payment was only required of the rates made within the qualifying year. In that case it was necessary to point out the largeness of the words used in s. 3 of the Representation of the People Act, 1867; in this case it has been necessary to consider how far that largeness required limitation.

Inasmuch as we hold that the only rates which it is necessary that a proposed voter should have paid are those made after the 5th of January of the year preceding the qualifying year; it is unnecessary to consider whether there was a valid excusal by justices in this case of the rates made in 1867 and 1869.

We are of opinion that the decisions of the revising barrister must respectively be affirmed and reversed, in accordance with this judgment.

Cull v. *Austin,—Decision affirmed.*
Austin v. *Cull,—Decision reversed.*

Attorney for Cull: *J. C. Selby, for Stroud, Cheltenham.*
Attorney for Austin: *T. W. Burr, for C. J. Chesshyre, Cheltenham.*

[END OF REGISTRATION CASES.]

1872
Jan. 17.

STAFFORD *v.* GARDNER.

Landlord and Tenant—Implied Contract—Valuation between Incoming and Outgoing Tenant—Custom of the Country—Browse of Straw.

22 Ch D 16

The plaintiff was tenant of a farm, with a right to the use of a certain part of the premises without payment until the 25th of March next after the expiration of the term, "for threshing and spending the last year's crop;" and by the custom of the country he was entitled, at the expiration of the term, to be paid by the landlord or the incoming tenant for certain tillages. He gave up the farm to the defendant, as incoming tenant, at Michaelmas, 1870, and before so doing valuers were mutually appointed to value the tillages as between them, with the consent of the landlord, and the valuers duly made and signed their valuation. After the defendant had entered into possession, but before the 25th of March, 1871, the landlord gave him notice that rent was due from the plaintiff, and required him to pay the amount of the valuation, which was less than the rent due, to him the landlord, and not to the plaintiff; and this the defendant did on receiving an indemnity from the landlord, but without the plaintiff's consent. The plaintiff having sued the defendant for the value of the tillages, was nonsuited:—

Held (the Court having power to draw inferences of fact), that the nonsuit was right, for that the contract to be implied between the incoming and outgoing tenant was subject to the right of the landlord to be paid the arrears of rent out of the valuation.

The plaintiff, on quitting the farm at Michaelmas, 1870, gave up to the defendant, and the defendant exercised it, the right which the plaintiff had under the lease of converting the straw on the farm (between Michaelmas, 1870, and the 25th of March, 1871) into manure with his cattle. In so converting it the cattle ate a certain portion of the straw, calculated to be one-third of the bulk, and which the valuers in this case valued as browse at 33*l.* :—

Held, that the plaintiff was entitled to recover this sum from the defendant.

This was an action brought by the plaintiff, trustee, under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), of one Bass, outgoing tenant of a farm, to recover from the defendant, the incoming tenant, the amount of a valuation made between Bass and the defendant before the bankruptcy of Bass.

The first count of the declaration stated that Bass was tenant to Umney of a farm for a term which expired before his petition for liquidation, when the defendant became tenant, and agreed with Bass to take the dung and manure laid upon the farm, and the corn, grass, turnips, and herbage growing thereon, and the straw, chaff, eaving, fixtures, chattels, and effects upon the premises, and that Bass should give up to the defendant the benefit of the sums of money and manure expended, and the work and labour done in managing and improving the farm and carting manure; that the defendant agreed to pay Bass for the same at a fair valuation to be made by Paine and Rogers, which was duly made; and that all things happened to entitle Bass and the plaintiff as his trustee to be paid the amount of the valuation and to entitle the plaintiff to maintain the suit; yet the defendant had not paid the same.

The second count was for fixtures, manure, straw, chaff, eavings, chattels, and effects bargained, sold, and given up, work and labour done, materials provided, moneys expended by Bass in ploughing, scuffling, harrowing, rolling, manuring, twitching and picking up manure, and improving the land, the benefit whereof Bass had not received any equivalent for on entering upon the lands, and for money which the defendant agreed to pay Bass for fixtures, chattels, money, straw, chaff, and eavings, and the benefits, work, tillages, and acts of husbandry, and labour done and materials, manure, seed, and moneys provided in ploughing, &c.

The third count was for money payable, work done, materials provided, fixtures, straw, chaff, manure, &c., goods bargained and sold, money paid, interest, &c. Claim, 106*l.* 18*s.* 4*d.*

Pleas, to the first count, 1. non assumpsit; 2. that defendant was not tenant, as alleged; 3. that no such valuation was made, as alleged; 4. to the residue of the declaration, never indebted; 5. to the whole declaration, that Bass was tenant to Umney from Lady-day to Michaelmas Day, 1870, and occupied the farm after the expiration of his and the commencement of the defendant's tenancy until Lady-day, 1871; that the straw, manure, &c., upon the farm were liable to be distrained for rent which might be due by Bass, who owed Umney on Michaelmas Day, 1870, 380*l.*; that Umney demanded the same of the defendant, who occupied the farm, and threatened to distrain for the same, who, in order to prevent the distress, did, on Lady-day, 1871, pay her 106*l.* 18*s.* 4*d.* for the rent in arrear as aforesaid; and that the matters in respect of which the valuation was made, and for non-payment whereof the plaintiff sued in the first count of the declaration, were the same matters which the plaintiff sought to recover in the residue of the declaration; 6. on equitable grounds, to the whole declaration,—that the defendant made the agreement and took the benefit of and received the goods under the belief that there was no rent in arrear from Bass, and that Umney would permit the valuation to be made, and permit Bass to receive the amount of the valuation; that Bass concealed from the defendant that he was in arrear for rent 380*l*., an amount exceeding the value of the claims; that, after the valuation, Umney informed the defendant that rent was in arrear from Bass, and threatened to distrain for the same, and refused permission that the defendant should pay the amount of the valuation to Bass, and required him to pay the same to Umney, which he thereupon did; 7 and 8. payment, and set-off. Issue thereon.

The cause was tried before Cockburn, C.J., at the last Summer Assizes at Bedford.

The evidence was that Bass occupied a farm as tenant to Mrs. Umney, under a lease which contained, amongst others, the following stipulations: "And the said John Bass shall leave in the yards all manure that shall remain at the expiration of the term, without any compensation or allowance for the same; and, if the whole of the last year's hay, straw, &c., shall not have been spent within the time hereinafter mentioned, shall leave the residue for the benefit of the landlord or succeeding tenant, without any compensation;" and also that "the said John Bass shall have the use of certain part of the farm without paying for the same until the 25th of March next after the expiration of the term hereby granted, for threshing and spending the last year's crops." The tenancy expired at Michaelmas, 1870, when the defendant succeeded Bass as incoming tenant, and entered into possession of the farm.

Before Michaelmas, 1870, Bass and the defendant agreed, with the knowledge of Nelson, the landlady's agent, who made no objection, for a valuation of the tillages, &c., to be made between them as between incoming and outgoing tenant, according to the custom of the country. A valuer was accordingly appointed by each, and Bass with the defendant and the two valuers met on the farm, and agreed upon the amount to be paid to Bass, 106*l*. 18*s*. 4*d*.; and the valuation for that sum was duly signed by the two valuers. The defendant, who had not yet paid Bass, on the 9th of November received a letter from Nelson, the agent, informing him, as the fact was, that Bass owed more than the amount of the valuation for rent, and requiring the defendant to pay the money to him, Nelson, and not to Bass. This letter was communicated to Bass by the defendant, but Bass, as the jury found, refused his consent to the arrangement. The defendant, however, notwithstanding, did, on receiving an indemnity from Nelson, pay the money over to him on the 23rd of March, 1871.

Bass did not exercise the power reserved to him by the lease of using a portion of the farm-yards for feeding his cattle after the expiration of his term; but the straw upon the farm at the preceding Michaelmas was consumed by defendant's cattle by permission of Bass; a portion of it, valued at 33*l.*, being eaten by them (termed "browse of straw," and estimated at one-third of the bulk), and the remainder being trodden into manure. The straw was all consumed before the defendant paid the amount of the valuation to Nelson.

The two valuers at the trial stated the custom of the country to be as follows:—Valuations are usually made between incoming and outgoing tenant. If the outgoing tenant is not satisfied as to the solvency of the incoming tenant, he has a right to look to the landlord for the valuation; in which case the landlord appoints a valuer, not the incoming tenant. They further stated that they never had known a case where the landlord claimed the amount of the valuation, on account of rent due; but they thought that, when rent was due, the landlord would have a right, if he thought proper, to appoint a valuer. That, if there is no incoming tenant, the outgoing tenant has a right, as against the landlord, to feed his cattle in the farm-yard with the straw till the ensuing Lady-day; and that they did not on this occasion include the straw in their valuation, but only the browse, i.e. the portion eaten by defendant's cattle, and which, both by the terms of the lease and the custom, Bass might have consumed by the mouths of his cattle.

The Lord Chief Justice left it to the jury to say whether or not Bass had assented to the payment to the landlord. The jury found that he had not; but his Lordship was of opinion that, nevertheless, the plaintiff was not, under the circumstances, entitled to maintain the action, and directed a nonsuit to be entered, but reserved leave to the plaintiff to move to enter the verdict for the

1872

STAFFORD *v.* GARDNER.

full amount claimed, or for 33*l.*, the value of the browse of straw. The Court to have power to draw inferences of fact.

A rule nisi was obtained in Michaelmas Term.

Jan. 12, 17. *O'Malley, Q.C.*, and *Merewether*, shewed cause. Ordinarily speaking, the contract in respect of tillages is between the landlord and the outgoing tenant. Unless there be in the original contract of letting some express stipulation to the contrary, the custom of the country becomes part of the contract. There is no privity between the outgoing and the incoming tenant. Instead, however, of a valuation of the tillages, &c., between the outgoing tenant and the landlord, and a second valuation between the latter and the incoming tenant, it has become usual to take the valuation as between the incoming and outgoing tenants; and it is now clearly established that the outgoing tenant may sue the incoming tenant for the amount of such valuation; but still he has no independent right against the incoming tenant which he would not be entitled to under his contract with the landlord: see Woodfall's Landlord and Tenant, 10th ed. 588; *Codd* v. *Brown* (1); *Sucksmith* v. *Wilson* (2): *Faviell* v. *Gaskoin* (3); *Muncey* v. *Dennis.* (4) In *Faviell* v. *Gaskoin* (3), Martin, B., lays down the rule thus: "The meaning of such a contract is this, that, at the time the tenancy commences, the landlord and tenant enter into a special contract, the one to receive and the other to pay the value of the tillages, to be repaid by the landlord at the expiration of the term. That is as much a part of the terms of the tenancy as if it were contained in the lease itself. It is true that in ninety-nine cases out of a hundred a new tenant comes in and takes the tillages for his own profit, and so becomes a debtor to the outgoing tenant. But still the landlord is liable upon his special contract." Rent being due to the landlord, he would unquestionably be entitled to deduct it from the amount of the valuation, if made between him and the outgoing tenant. The incoming tenant must necessarily have the same right, on receiving notice from the landlord that rent is in arrear, for which the latter might distrain. The consent

(1) 15 L. T. (N.S.) 536.

(2) 4 F. & F. 1083.

(3) 7 Ex. 273; 21 L. J. (Ex.) 85.

(4) 1 H. & N. 216; 26 L. J. (Ex.) 66.

of the landlord is necessary to enable the incoming tenant to pay the outgoing tenant.

Bulwer, Q.C., and *Graham*, in support of the rule. The plaintiff is entitled to maintain this action. It cannot be doubted that there may be a binding contract as between the outgoing and the incoming tenant, as is stated by Martin, B., in his judgment just cited, in *Faviell* v. *Gaskoin.* (1) Here it is admitted that the defendant's valuer acted for him, the incoming tenant, and not for the landlord (and this distinguishes the present case from *Codd* v. *Brown.* (2)); and the valuation was reduced to writing, and signed by the two valuers on behalf of the contracting parties. Nothing more was needed for the validity of the contract, and the defendant has had the full benefit of it. The rule is laid down thus in Woodfall, 10th ed. p. 588: "When the lease or tenancy of a farm expires or determines otherwise than by the death of the lessor, the tenant must give up possession of the whole to the landlord or his assigns, crops and everything else, unless there be some special stipulation to the contrary in the lease, or some custom of the country for the tenant to hold over part of the demised premises, or to take some of the crops. If the terms of the lease are inconsistent with the custom, they will exclude it; and in such case the tenant must look to his remedy under the covenants in the lease. But, where the custom is not excluded by the terms of the lease, the outgoing tenant may maintain an action against the landlord for the value of such tillages, manure, &c., as he is entitled to be paid for according to the custom. Or if he has made a new contract with the incoming tenant to pay for such tillages, manure, &c., he may recover the amount or value thereof from him." The question here is, whether the landlord can, after such new contract has been made between the incoming and outgoing tenants with the knowledge of the landlord, and after the incoming tenant has been let in and had the full benefit of the contract, intercept the payment of the amount of the valuation, on the ground that rent is due from the outgoing tenant. No doubt, an agreement made between the outgoing and incoming tenants is not to prejudice the rights of the landlord. The landlady might, notwithstanding the agreement in this case, have distrained upon Bass

---

(1) 7 Ex. 273; 21 L. J. (Ex.) 85.

(2) 15 L. T. (N.S.) 536.

1872

STAFFORD v. GARDNER.

for his rent, even up to the 25th of March, both at common law and by virtue of 8 Anne, c. 14, ss. 6, 7 ; or, she might have insisted upon the valuation being made to her; but, having done neither, and having assented to the valuation being made to the defendant, she had lost her right to intervene, and was left to her ordinary remedy against Bass. Suppose he had sold a stack of hay, or any other chattel subject to distress for rent, and the purchaser had taken it away and used it, could she have insisted upon the purchaser paying the price to her? or if the purchaser had paid her the price under an indemnity, would that have defeated Bass's action against him? The defendant, it is submitted, has no answer to this action. The only plea which he attempted to prove at the trial was the plea of payment; and this the jury negatived.

At all events, the plaintiff is entitled to recover the value of the browse of straw, 33*l.*, of which the defendant has had the benefit, and for which the landlady could not distrain, seeing that the straw was browsed and gone before the payment of the valuation was made to Nelson: *Clarke* v. *Westrope.* (1)

Willes, J. The impression on my mind is strong in favour of the opinion expressed by the Lord Chief Justice with reference to the sum sought to be recovered in respect of the tillages. Ordinarily, the landlord is bound to pay the outgoing tenant for all things left upon the farm at the expiration of the term for which the tenant is by the contract or by custom entitled to compensation; but the settlement is an equitable settlement of all matters between them, and the landlord is to be allowed the amount of rent due to him. As to that there can be no doubt; and in this case neither the tenant nor his trustee could have enforced payment of the valuation against the landlord, except with an allowance of the rent. That is the primâ facie right of the outgoing tenant. But it constantly happens that a different course is adopted, and that the incoming tenant, who in the end, by his bargain with the landlord, is to take and pay for the tillages, in order to avoid circuity and the trouble and expense of two valuations, agrees with the outgoing tenant that the valuation shall be made directly from the latter to him. That, however, does not rest upon the custom, but is a mere conventional arrangement, without which there would be no privity between the outgoing and the incoming tenant. There is, generally speaking, no formal agreement; but each appoints a valuer, and the valuers settle the amount to be paid; and the result is a sort of implied contract which places the outgoing tenant, with respect to the landlord, in precisely the same position as if the custom had been strictly pursued. That being so, it follows that if rent is due from the outgoing tenant to the landlord, and such rent is paid by the incoming tenant, it is a payment made in discharge of a liability of the outgoing tenant. Consequently, in this case, as regards the amount due for tillages, the incoming tenant, having been called upon to pay and having paid the rent due, is discharged to the extent of such payment as against the outgoing tenant. Looking at the special circumstances of this case, if I were dealing with this as a question of fact, I should hold that there was an assent as between all the parties that this course should be adopted. But I go further. I think there was no evidence of any contract between the plaintiff and the defendant here, except one involving the payment of the rent due to the landlady. Further, I should say that, where by the original contract the outgoing tenant has a right to hold over a portion of the farm, as here, that operates under the statute as an extension of the term, and gives the landlord a right to distrain during the extended period; and it would be manifestly unjust that the incoming tenant should be liable to be troubled by the landlord's entry. Considerations of convenience, therefore, would seem to urge one to a conclusion which I should have had no difficulty in arriving at without them. This covers the plaintiff's claim in this action as to the tillages; and, if the matter had rested there, I should have been of opinion that the rule should be discharged.

---

(1) 18 C. B. 765; 25 L. J. (C.P.) 287.

But a further point has been raised, from which I see no way of escaping. It is said that there is no reason why the defendant should not pay for the browse of straw, which stands on a different footing from the tillages. By the terms of the lease, the outgoing tenant had a special right to the use of a portion of the farm until Lady-day, 1871, for the purpose of consuming the straw. In the event of his not consuming it within that period, he was to

1872

STAFFORD v. GARDNER.

leave it without receiving any payment for it. That straw was taken to by the incoming tenant. That, at all events, was liable to distress by the landlady. If she had distrained, and had been paid out by the incoming tenant, or if she had threatened a distress, and been paid off, the defendant might have set off the value of that straw. But neither of these events happened: the straw was browsed by the defendant's cattle before the end of February. The payment, therefore, on the 23rd of March, was made to the landlady after she had lost her power to distrain as to that. To the extent, therefore, of 33*l.*, the value of the browse of straw, the defendant has bought something for which he has not paid: and it is no answer for him to say that he has paid a debt of the plaintiff's, for which he was not liable to be distrained on. Unless, therefore, the defendant desires to have a new trial in order to have this point more fully considered, I think the verdict should be entered for the plaintiff for 33*l.*

Brett, J. The jury having found that Bass did not assent to the payment made to the landlord, the first question is whether there was any evidence of a contract between the outgoing tenant and the defendant to pay the amount of the valuation. The material facts as to that are that each of them appointed a valuer to make the valuation on his behalf, with the knowlege of Nelson, the landlady's agent, who made no objection. Upon these facts alone, I should say there was evidence for the jury that the parties did contract. It was urged on behalf of the defendant that there was no evidence of a contract, because it was not shewn that the landlady assented, and that it was not competent to the incoming and outgoing tenants to contract without such assent. I am not aware of any rule of law which prevents the outgoing and incoming tenants from making a contract without the landlord's consent. I think there was in this case evidence from which the jury might find that there was a contract between the two tenants, and that a nonsuit on that objection would have been wrong. The next question is, what was the nature of that contract. There is no express promise by the defendant. What, then, was the implied promise? To ascertain this we must consider the position of both the parties. There was a contract between the outgoing tenant and the landlady, under which the landlady was to pay the tenant the value of the tillages according to custom; but the landlady was entitled to deduct therefrom any rent which might be in arrear. Besides, notwithstanding the arrangement between the outgoing and the incoming tenant, the landlady had power, so long as the things were in existence, down to the 25th of March, 1871, to distrain them for rent, and, if she did so, it would be to the injury of the incoming tenant, unless he was able to pay the rent. It is by reason of that power that it is to be inferred, and it is the only reasonable inference which could be drawn, that the outgoing and incoming tenants must have agreed that the latter should be at liberty to defend himself against any loss by paying the rent to the landlord, and the difference between that and the valuation to the outgoing tenant. I think that is the only reasonable implication that can be drawn, and is one which the jury should have been *directed* to draw, and not merely have been left to find or not, as they pleased.

But, in this particular case, the subject-matter of valuation between the outgoing and the incoming tenant embraced something more than what fell within the custom, viz. the browse of straw. To this the same reasoning does not apply. If it has been consumed, no question of the landlord's right could arise; for, in that event, the landlord could have no claim against the outgoing tenant in respect of that; and the ordinary implication would be that the incoming tenant was to pay the outgoing tenant for it. I therefore think the nonsuit was right as to the tillages, but that the plaintiff was entitled to recover for the browse of straw, which was valued at 33*l.* But, as this point, judging from the notes of the Lord Chief Justice, does not seem to have been fully brought to his attention at the trial, I agree with my Brother Willes that, if the defendant wishes it, there should be a new trial.

GROVE, J. I am of the same opinion. By the original contract and the custom, the landlady was primarily liable to the tenant for the tillages at the end of the term, and so far there was no privity between the outgoing and the incoming tenants. There is no doubt, however, that these two may contract for a valuation as between themselves: but, in order to displace the original contract, there must be an express contract between the outgoing and the incoming tenant. The only evidence relied on here to shew a substituted contract was the fact of the incoming tenant choosing a valuer. That, however, seems to me to leave the contract as it was before. I agree with my Brother Willes that the contract to be implied from the evidence is, that the incoming tenant should, in order to avoid circuity, stand in the place of the landlord.

As to the 33*l.*, I regret to be obliged to concur with my learned Brothers. The point as to that was not argued by counsel on one side, and was not the main point relied on at the trial. Still, the matter is no doubt now open: and I cannot see that the plaintiff is not entitled to a verdict to that extent.

Merewether, for the defendant, elected to have the rule made absolute for a new trial.

The rule ultimately pronounced was that the nonsuit should be set aside and a new trial had; and that, in the event of the plaintiff succeeding upon the second trial, the costs of both trials, so far as related to the sum of 33*l.* for browse of straw, should be plaintiff's costs.

Rule accordingly.

Attorneys for plaintiff: *Thomas & Hollams.*
Attorneys for defendant: *Risley & Stoker.*

END OF HILARY TERM, 1872.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

EASTER TERM, XXXV VICTORIA.

SHARP *v.* POWELL.

1872
April 24.

Nuisance—Washing Cart on a Highway, in Breach of a Statute—Proximate Damage—2 & 3 Vict. c. 47, s. 54, sub-s. 1.

The defendant's servant (in breach of the Police Act, 2 & 3 Vict. c. 47, s. 54) washed a van in a public street, and allowed the waste water to run down the gutter towards a grating leading to the sewer, about twenty-five yards off. In consequence of the extreme severity of the weather, the grating was obstructed by ice, and the water flowed over a portion of the causeway, which was ill paved and uneven, and there froze. There was no evidence that the defendant knew of the grating being obstructed. The plaintiff's horse, while being led past the spot, slipped upon the ice and broke its leg:—

Held, that this was a consequence too remote to be attributed to the wrongful act of the defendant.

The declaration stated that the defendant wrongfully caused a van of his to be washed in a public highway, in &c., and thereby caused a public nuisance, and caused large quantities of water to be collected together, whereby the water became frozen and dangerous to the traffic of the highway; and the plaintiff's horse, whilst lawfully passing along the highway, slipped upon the ice,

1872

SHARP
v.
POWELL.

and fell and broke its knee, and was necessarily killed, &c. Plea, not guilty. Issue thereon.

The cause was tried before Keating, J., at the sittings at Westminster after last Michaelmas Term. The plaintiff is a job-master, and the defendant a corn-merchant carrying on business at High Street, Hoxton, having a stable and coach-house abutting upon a public street called Felton Street. On the morning of the 21st of November, 1871, the defendant's van had been washed in the street opposite his coach-house. The water used in the operation flowed into the channel or gutter at the side of the street, and thence under ordinary circumstances would have found its way to a sink or grating at the corner of the street about twenty-five yards from the spot where the van was washed, and so into the sewer. It happened, however, that the weather was and had been for about a fortnight extremely severe, and that, the grating being frozen over, the water had spread three or four feet over the paving, which was much out of repair, and so formed a sheet of ice. A servant of the plaintiff was taking two horses to be rough-shod, riding one and leading the other, when the led-horse slipped upon the ice and fell, receiving the injury complained of.

For the plaintiff it was contended that the defendant was responsible for the injury, as being the consequence of his wrongful act, viz. causing his van to be washed in a public highway in breach of an Act of Parliament. (1) For the defendant, it was contended that the damage was too remote, and not the natural, necessary, or probable consequence of the defendant's act.

The learned judge nonsuited the plaintiff, reserving leave to him to move to enter a verdict for 25*l*., if the Court (who were to be at liberty to draw inferences of fact) should be of opinion that the damage was not too remote: all powers of amendment being also reserved.

A rule nisi having been obtained,

April 22. *H. James, Q.C.*, and *Lanyon*, shewed cause. The ruling of the learned judge was correct. Assuming that the act

---

(1) Metropolitan Police Act, 2 & 3 Vict. c. 47, s. 54, sub-s. 1, which imposes a penalty not exceeding 40s. upon any person who shall, in any thoroughfare or public place, "clean any cart or carriage."

1872

SHARP
v.
POWELL.

of the defendant's servant in washing the van in a public place was an unlawful act, in the sense of its rendering him liable to a penalty, the damage to the plaintiff was not the natural or likely consequence to result from it in the ordinary course of things. If the grating had not been foul or frozen, the water which the defendant's servant used in the operation of washing the van would have flowed in its natural channel, and reached the sewer without injury to any one. The defendant is not to be held responsible for the stoppage of the drain, or the defective state of the pavement, which allowed the water to accumulate and expand over the roadway: nor has he been guilty of any wilful or malicious act, to make him a wrong-doer in the ordinary sense. In general, a man is only liable for such consequences of his tortious or negligent act as might reasonably be anticipated as its result. In Addison on Torts, 3rd ed. 5, it is said: "The general rule of law is, that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, though those consequences be immediately and directly brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrong-doer, or provided their acts causing the damage were the necessary or legal and natural consequence of the original wrongful act;" for which proposition the squib case, *Scott* v. *Shepherd* (1), is referred to. In Sedgwick on Damages, 4th ed. 90, the rule, adopted from the judgment of the Supreme Court of New York in *Clark* v. *Brown* (2), is thus stated: "The rule of law is well established, that, in cases of torts, it is necessary for the party complaining to shew that the particular damages in respect to which he proceeds are the *legal* and *natural* consequences of the wrongful act imputed to the defendant." And in Mayne on Damages, 15, the general principle is given in these words: "The first, and in fact the only inquiry in all these cases is, whether the damage complained of is the natural and reasonable result of the defendant's act: it will assume this character if it can be shewn to be such a consequence as in the ordinary course of things would flow from the act, or, in cases of contract, if it appears to have been contemplated by both parties. Where neither of these elements exists, the damage is said to be too remote." In *Hoey* v. *Felton* (1), the plaintiff had been apprehended at the instance of the defendant upon an unfounded charge: having been discharged after about an hour's detention he went home, instead of presenting himself at once at a place where he would have obtained employment: and it was held that the loss of the engagement was too remote a damage. Erle, C.J., there says (2): "The damage does not immediately and according to the common course of events follow from the defendant's wrong: they are not known by common experience to be usually in sequence. The wrong would not have been followed by the damage, if some facts had not intervened for which the defendant was not responsible." Suppose in the present case a stranger had dammed back the water in the gutter, and so caused it to accumulate and to flow over the roadway, and it afterwards froze, would the defendant have been responsible for that? In *Greenland* v. *Chaplin* (3), Pollock, C.B., says: "I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated. Whenever that case shall arise, I shall certainly desire to hear it argued, and to consider whether the rule of law be not this, that a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur." In *Cox* v. *Burbidge* (4), the defendant's horse strayed on to a highway, and kicked the plaintiff, a child, who was playing on the footpath; and it was held that, although the horse was wrongfully on the highway, the injury complained of was not such a consequence of the wrong as the owner of the horse was liable for. In *Burrows* v. *March Gas Co.* (5), as well as in *Smith* v. *London and South Western Ry. Co.* (6), the damage was the natural and necessary consequence of the negligence of the defendants.

---

(1) 3 Wils. 403; 2 W. Bl. 892.

(2) 18 Wendell, 213, 229.

---

(1) 11 C. B. (N.S.) 142; 31 L. J. (C.P.) 105.

(2) 11 C. B. (N.S.) at p. 146.

(3) 5 Ex. 243, at p. 248.

(4) 13 C. B. (N.S.) 430; 32 L. J. (C.P.) 89.

(5) Law Rep. 5 Ex. 6~~5~~; in error, Law Rep. 7 Ex. 96. 7/

(6) Law Rep. 5 C. P. 98; in error, Law Rep. 6 C. P. 14.

[BOVILL, C.J. Was there any evidence that the defendant knew of the stoppage of the drain?]

None whatever. If there had been, it might possibly have brought the case within *Harrison* v. *Great Western Ry. Co.* (1)

Metcalfe, in support of the rule. If the plaintiff's horse had met with the injury at the spot where the washing of the van took place, no one could have doubted the defendant's liability; and *Brown* v. *Bussell* (2) is an authority to shew that the fact of its having occurred a short distance off can make no difference. The accident was the result of the defendant's negligent and wrongful act; and the damage was not too remote. In *Romney Marsh (Bailiff)* v. *Trinity House Corporation* (3) the defendants' vessel, owing to the negligence of their servants, struck on a sand-bank, and, becoming from that cause unmanageable, was driven by the wind and tide upon a sea-wall of the plaintiff's, and damaged it; and it was held that the defendants were liable for the damage so caused. It was contended there that the damage was too remote; but Kelly, C.B., said: "The rule of law is, that negligence, to render the defendants liable, must be the causa causans, or the proximate cause of the injury, and not merely a causa sine quâ non. I think that it was so in the present case." *Scott* v. *Shepherd* (4) and *Smith* v. *London and South Western Ry. Co.* (5) are distinct authorities in favour of the plaintiff. Wherever the consequences of the negligent or wrongful act complained of are the probable or likely result of such an act, the guilty party is responsible for them; as in *Vaughan* v. *Menlove* (6), where it was held that an action lay against the defendant for so negligently constructing a hay-rick on the extremity of his land that in consequence of its spontaneous ignition his neighbour's house was burnt. Tindal, C.J., there refers to *Tubervil* v. *Stamp* (7), where it was decided that if an occupier burns weeds so near the boundary of his own land that damage ensues to the property of his neighbour, he is liable to an action for the amount of injury done, unless the accident were occasioned by a sudden blast which he could not foresee. In

---

(1) 3 H. & C. 231; 33 L. J. (Ex.) 266.

(2) Law Rep. 3 Q. B. 251.

(3) Law Rep. 5 Ex. 204; in error, Law Rep. 7 Ex. 24.

7/

(4) 3 Wils. 403; 2 W. Bl. 892.

(5) Law Rep. 5 C. P. 98; in error, Law Rep. 6 C. P. 14.

(6) 3 Bing. N. C. 468.

(7) 1 Salk. 13.

Reynolds v. *Clarke* (1), it is laid down as clear law that, "if one lays a log of wood in the highway, and another receives hurt by it, the latter may maintain an action." That principle was acted upon by the Court of Exchequer in a recent case, *Shepherd* v. *Midland Ry. Co.* (2), where water, which had trickled from a waste pipe at a railway station on to the platform, had become frozen into ice, and the plaintiff a passenger stepped upon it, fell, and was injured; the Court held the defendants liable for negligence in not removing the ice. In *Cox* v. *Burbidge* (3) the action failed, not because the damage was too remote, but because there was no scienter. Applying the principle of these cases to the facts proved here, there can be no doubt that the jury were warranted in finding that the defendant was guilty of negligence in permitting water to flow over the causeway during so severe a frost; and the damage to the plaintiff was sufficiently proximate. If there was any evidence for a jury, the verdict must stand.

[BOVILL, C.J. Was not the plaintiff himself negligent in sending out his horses unroughed in such weather?]

The horses were being sent to the blacksmith's for the very purpose of being roughed. Besides, the question of contributory negligence was not suggested at the trial; neither has it been upon the argument of this rule.

BOVILL, C.J. No doubt, one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom; but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shewn that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person. Where there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person it is generally considered that the wrongful act is not the proximate cause of the injury, so as to render the wrong-doer liable to an action. In the present case, the learned judge has reserved power to us to draw inferences from the facts; and the proper inference to be drawn from the evidence seems to me to be that, if the drain had not been stopped, and the road had been in a proper state of repair, the water which the defendant's servant caused to flow into the gutter or channel would have passed away without doing any mischief to any one. Can it, then, be said to have been the ordinary and probable consequence of the defendant's act that the water should have frozen over so large a portion of the street as to occasion a dangerous nuisance? I think not. There was no distinct evidence to shew the cause of the stoppage of the sink or drain, or that the defendant knew it was stopped. He had a right, then, to expect that the water would flow down the gutter to the sewer in the ordinary course; and, but for the stoppage (for which the defendant is not responsible), no damage would have been done. The conclusion, therefore, I feel compelled to come to is, that the defendant could not reasonably be expected to foresee that the water would accumulate and freeze at the spot where the accident happened. Besides, upon the facts, one cannot help seeing,—notwithstanding it is said that contributory negligence was not urged as a point at the trial,—that the plaintiff was himself somewhat in fault for sending out horses not roughed, and over an ill-paved road, in weather such as that described by the witnesses. I am content, however, to found my judgment upon the other part of the case, viz. that the injury was not of such a character as the defendant could have contemplated as the ordinary or likely consequence to result from his permitting his van to be washed in the public street.

---

(1) 2 Ld. Raym. 1399.

(2) Before Martin and Pigott, BB., on Jan. 23, 1872, not reported.

(3) 13 C. B. (N.S.) 430; 32 L. J. (C.P.) 89.

Grove, J. I am entirely of the same opinion. I think the act of the defendant was not the ordinary or proximate cause of the damage to the plaintiff's horse, or within the ordinary consequences which the defendant may be presumed to have contemplated, or for which he is responsible. The expression, the "natural" consequence, which has been used in so many cases, and which I myself have no doubt often used, by no means conveys to the mind an adequate notion of what is meant: "probable" would perhaps be a better expression. If on the present occa-

1872

SHARP
v.
POWELL.

sion the water had been allowed to accumulate round the spot where the washing of the van took place, and had there frozen obviously within the sight of the defendant, and the plaintiff's horse had fallen there, I should have been inclined to think that the defendant would have been responsible for the consequences which had resulted. But there must be some limit to the liability of a man for the consequences of a wrongful act; and it does not by any means follow that, though the act of allowing the water to flow over the street in the first instance was wrongful, the defendant is liable for a stoppage occurring after the water had got back into its proper and accustomed channel. The defendant was not bound to go down the street and see whether or not any obstacle existed at the drain. I cannot therefore see that the damage to the plaintiff's horse was the proximate or the probable result of the washing of the defendant's van in the street rather than in his own stable or coach-house. I think Mr. Lanyon put the case upon the true ground. The damage complained of was not proximately caused by the original wrongful act of the defendant.

KEATING, J. After hearing the argument, I must confess I retain the impression I had at the trial. There can be no doubt that the proximate cause of the damage sustained by the plaintiff was the accumulation of water at the corner of the street, and its freezing there. I nonsuited the plaintiff, but gave him leave to move, reserving power to the Court to draw inferences of fact. As I think the point as to contributory damage was not prominently, or perhaps at all, brought forward at the trial, I prefer to rest my judgment on the ground that the damage did not immediately flow from the wrongful act of the defendant, nor was such a probable or likely result as to make him responsible for it. The natural consequence, if that be a correct expression, of the wrongful act of the defendant would have been that the water would under ordinary circumstances have flowed along the gutter or channel, and so down the grating to the sewer. The stoppage and accumulation of the water was caused by ice or other obstruction at the drain, not shewn to have been known to the defendant, and for which he was in no degree responsible. That being so, it would obviously be unreasonable to trace the damage indirectly back to the defendant. It may be said, and indeed it has been said, that, if the defendant had not washed his cart where he did, and allowed the water to run down to the drain, it would not have accumulated and frozen there, and so the accident would not have happened. If that is to render the defendant liable, where is the liability to stop? The damage in question, not being one which the defendant could fairly be expected to anticipate as likely to ensue from his act, is in my judgment too remote.

Rule discharged.

Attorney for plaintiff: *J. F. Holmes.*
Attorneys for defendant: *Mills & Lockyer.*

STEELE, APPELLANT; BRANNAN, RESPONDENT.

April 30.

Obscene Publication—Misdemeanour—Seizure and destruction of Obscene Books under 20 *&* 21 *Vict. c.* 83, *s.* 1*—Report of Judicial Proceedings—Privilege.*

A police magistrate had ordered the destruction of copies of a pamphlet, which the appellant kept at his shop for sale, as obscene books, under 20 & 21 Vict. c. 83, s. 1. This pamphlet was a substantially correct report of the trial of one G. M., on an indictment for a misdemeanour in selling a certain obscene work called the "Confessional Unmasked;" but it set out that work in full, whereas at the trial it was taken as read, and passages in it only referred to:—

Held (following the decision in *Reg.* v. *Hicklin* (Law Rep. 3 Q. B. 360), that the pamphlet, being of such a character that it would necessarily tend to the depravation of the public morals, was an obscene book within 20 & 21 Vict. c. 83, even although the object of those publishing it were to suppress a system they thought immoral and pernicious.

Held, also (following the decision in *Rex* v. *Carlile* (3 B. & A. 167), that the privilege given by the law to reports of judicial proceedings does not extend to reports which contain matters of an obscene and demoralising character, and that the case was therefore within 20 & 21 Vict. c. 83, and the decision of the magistrate correct.

CASE stated by a police magistrate under 20 & 21 Vict. c. 43.

1. The appellant is the occupier and manager of a shop, being 14, Tavistock Street, Covent Garden, within the metropolitan police district, for a body called or known as the Protestant Electoral Union, whose objects, as set forth in their prospectus, are inter alia "to protest against the teachings of the Romish and Puseyite systems, which are un-English, immoral, and blasphemous;

to maintain the Protestantism of the Bible and the liberty of England;" and "to promote the return to Parliament of men who will assist them in these objects; and particularly will expose and defeat the deep-laid machinations of the Jesuits, and resist grants of money for Romish purposes."

2. On the 26th day of January, 1871, the respondent, who was an inspector of the metropolitan police, under authority given to him by special warrant duly issued under 20 & 21 Vict. c. 83, seized, at the shop, 14, Tavistock Street, aforesaid, about 181 copies of "A Report of the Trial of George Mackey, at the Winchester Quarter Sessions, 18th and 19th October, 1870, from Short-hand Notes of Dr. Soutter, Lecturer on Short-hand in King's College, London; containing the Full Text of the 'Morality of Romish Devotion, or the Confessional Unmasked,' shewing the Depravity of the Romish Priesthood and the Iniquity of the Confessional. For the use of Heads of Families and Persons of Mature Years." The above was the title on the cover and on the first page.

3. Some of these reports were sold in covers on the outside of which no reference was made to the trial, but which contained the following title and description of the book:

"The Morality of Romish Devotion, or the Confessional Unmasked; shewing the Depravity of the Romish Priesthood and the Iniquity of the Confessional.

"The extracts contained in this pamphlet are simply specimens of the moral theology of Rome, taught in the Royal College of Maynooth at a cost of 30,000*l.* per annum to this heavily-taxed Protestant nation. Through the unfaithfulness of both Christians and politicians, lawlessness has become legalized amongst us, and the most atrocious and obscene maxims and practices have been imposed upon the people as moral theology and the requirements of religion. On behalf of morality and religion we adjudge the confessional as here 'unmasked' to be a foul blasphemy, and worthy to be execrated of mankind, and we appeal to the Word of God and the common sense of the people for a confirmation of our verdict.—Ed.

"'The time may come when it will become our bounden though painful duty to rouse the indignation of Englishmen at the expense of their modesty by translating and circulating some of the contents of that charnel-house the confessional.'—DR. MCNEILE.

"Protestant Evangelical Mission and Electoral Union, 14, Tavistock Street, Covent Garden, London. Price One Shilling. To be had at all Booksellers'."

4. On the 2nd day of February last the appellant duly appeared at the Bow Street police court, before Sir Thomas Henry, the chief magistrate of the police courts of the metropolis, in answer to a summons duly issued under the said statute, to shew cause why the said books so seized should not be destroyed.

5. The Protestant Electoral Union had been in the habit of selling and distributing copies of the "Confessional Unmasked" previous to April, 1868, when the decision was given in the case of *Reg.* v. *Hicklin.* (1) In consequence of that decision the first edition of the book was withdrawn and a new one published, as stated in the following extract from the introduction (p. iii.) to the new edition: "Consequently the society withdraws the condemned edition, and does not intend publishing it; but the publication of a new edition in an altered form—that is, with certain alterations, certain omissions, and certain additions—would not come under the condemnation passed upon the former edition. Such an edition, then, is here presented to the public. In this edition are omitted some of the most filthy and abominable passages occurring in the former edition; also in this edition some passages are added for the sake of illustrating the pernicious influence exercised by the priests in the confessional over the minds and consciences of the laity, even apart from the demoralising and polluting influence exercised by them when employing the obscene language authorized and enforced by the Church. See also page 3 of the 'Apology.'"

7. For selling this new edition one George Mackey was tried at the Winchester Quarter Sessions, the 19th of October, 1870, when the jury, being unable to agree, were discharged without giving any verdict.

8. The appellant kept for sale and distribution, and sold and distributed from time to time at the said shop, copies of various books and pamphlets, and amongst them, the first edition of the

---

(1) Law Rep. 3 Q. B. 360.

"Confessional Unmasked;" and after the decision of the Court of Queen's Bench, the new edition of the book, and after the committal for trial of the said George Mackey, the "Report of the Trial of George Mackey" was published and sold.

The "Confessional Unmasked," consists of extracts from Roman Catholic theologians and divines. On one side of the page are printed passages in the original Latin, extracted from the authors therein named, and on the other side a free translation of the same. Other portions of the pamphlet consist of introductory matter, and of observations by the editor.

9. The "Report of the Trial of George Mackey" was a substantially correct report of the trial of that person, but the "Confessional Unmasked" was not read aloud in open court, and this explains the following paragraph at the bottom of page 2 of the report: "The sale of the "Confessional Unmasked" having been proved, reads as follows:" then follows the full text of the new edition of the "Confessional Unmasked."

10. The retail price of the "Report of the Trial, &c.," was one shilling. It was exposed for sale in the shop window, and sold to any person who applied for it, sometimes in one of the covers before mentioned, and sometimes in the other.

11. A copy of the "Report of the Trial, &c.," which was seized and ordered to be destroyed, and which is annexed hereto, is to form part of the case.

12. It was contended before me on behalf of the appellants, that upon the facts stated, the book seized, viz. the "Report of the Trial, &c.," was a fair report of a trial in a court of competent jurisdiction, and as such privileged.

13. I was of opinion that the "Report of the Trial of George Mackey, &c.," as sold and published, was not privileged.

14. I was further of opinion that the "Report of the Trial, &c.," a copy of which is annexed, was an obscene book, and of such a character and description that the publication of it was a misdemeanour, and proper to be prosecuted as such, and that the copies seized were kept in the shop for the purpose of sale.

15. I therefore ordered all the copies of such book so seized as aforesaid to be destroyed at the expiration of the time mentioned in the statute.

16. The appellant being dissatisfied with my determination as being erroneous in point of law only, gave me notice in writing to state and sign a case for the opinion of this Honourable Court, under 20 & 21 Vict. c. 43.

17. The question for the opinion of this Court is, whether, upon the facts above stated, I was wrong in point of law in ordering the books to be destroyed. (1)

April 29. *Kydd*, for the appellant. This book was not an obscene book within 20 & 21 Vict. c. 83. In order to bring it within that statute, the publication of it must be a misdemeanour at common law. In order to make such publication a misdemeanour, it must be with a criminal intent. Here the intent was not to pollute the public mind, but to expose an immoral system. The nature of the book is controversial, and the subject with which it deals one of the highest public importance. All the portions of the book which are objected to are extracts from the works of Roman Catholic divines and casuists, which are quoted merely for the purpose of condemning the system of the confessional. What effectual remedy is there in the hands of persons wishing to suppress a system which they conceive to be pernicious, except to expose the tendency of such a system by reference to the writings in which it is expounded? (2)

It is further contended that this work was privileged, as being a

(1) The "Report of the Trial of George Mackey, &c.," set out in full the new edition of the "Confessional Unmasked." The new edition, although differing in some respects from the first edition, the character of which will be found discussed in the report of *Reg.* v. *Hicklin* (Law Rep. 3 Q. B. 360), was substantially of a similar character. It appeared from the "Report of the Trial, &c.," that the "Confessional Unmasked" was not read in full at the trial, but was put in and taken as read, and that counsel in the conduct of the case referred to the various paragraphs of it by their numbers, and read some portions as illustrating the character and object of the work.

(2) In the course of the argument a number of authorities and passages in various works were referred to; but it is not thought necessary to set out the argument on this point at greater length, inasmuch as, although it was contended that there was sufficient difference between the two editions of the "Confessional Unmasked" to take the case out of the decision in *Reg.* v. *Hicklin* (Law Rep. 3 Q. B. 360), substantially the arguments and the authorities cited were the same as those given in the report of that case.

1872

STEELE *v.* BRANNAN.

fair report of the proceedings at a trial. *Rex* v. *Carlile* (1) is not in point. The decision of the Court there proceeded upon the fact that the report was not a bonâ fide report. It was headed "Mock Trial," and the object of the publication was clearly to bring the proceedings of the court into disrepute. He also cited on this point *Rex* v. *Eaton* (2); *Popham* v. *Pickburn* (3); *Hoare* v. *Silverlock* (4); *Turner* v. *Sullivan.* (5)

Sir J. D. Coleridge, A.G. (*Archibald* and *Poland* with him), for the respondent. The decision in *Reg.* v. *Hicklin* (6) clearly governs the present case. Works such as those from which these extracts are taken may, upon proper occasion calling for their discussion, be made the subject of controversy in a fitting manner. It is clear that parties are not entitled to collect extracts of this nature from books of casuistry and theology of a quasi-scientific character, and publish them in the form of a pamphlet for indiscriminate sale at a cheap rate.

With respect to the question of privilege, *Rex* v. *Carlile* (1) is directly in point.

Kydd, in reply.

April 30. The following judgments were delivered:—

Bovill, C.J. This case comes before us by way of appeal from the decision of a magistrate upon a case stated under 20 & 21 Vict. c. 43; and the only question which now arises is whether, upon the facts stated, that decision was right as a matter of law. Upon looking over the book, it appears to me that no inconsiderable portion of its contents is of a most shockingly filthy description. During the argument counsel could do no more than call attention to the pages in which the objectionable passages occur, without referring to them more particularly. The book is one which would manifestly tend to deprave and corrupt the morals, more especially of the young and inexperienced. That being so, it appears to me necessarily to follow that the publication of the book would be a misdemeanour, and the book is conse-

(1) 3 B. & A. 167.

(2) 31 State Trials, 927.

(3) 7 H. & N. 891; 31 L. J. (Ex.) 133.

(4) 9 C. B. 20; 19 L. J. (C.P.) 215.

(5) 6 L. T. (N.S.) 130.

(6) Law Rep. 3 Q. B. 360.

quently obscene within the meaning of the statute, 20 & 21 Vict. c. 83.

It was, however, strongly contended by the counsel for the appellant, that the book treated of a matter which might properly be made the subject of discussion and controversy, and that the object of those who put it forward being not only innocent but praiseworthy, inasmuch as they intended thereby to advance the interests of religion and of the public, the publication of the book was not a misdemeanour, and consequently the book was not obscene within the statute 20 & 21 Vict. c. 83. There is no doubt that all matters of importance to society may be made the subject of full and free discussion, but while the liberty of such discussion is preserved, it must not be allowed to run into obscenity and to be conducted in a matter which tends to the corruption of public morals. The probable effect of the publication of this book being prejudicial to public morality and decency, the appellant must be taken to have intended the natural consequences of such publication, even though the book were published with the objects referred to by his counsel. This point was fully considered in the case of *Reg.* v. *Hicklin* (1), in which the principal authorities on the subject were cited and commented upon. There the sessions, on appeal, had reversed the decision of the magistrates, on the ground that the immediate intention of the appellants was not to corrupt the public mind, but to expose the errors of the confessional system. It was assumed, for the purposes of the judgment in that case, that the appellants had really and bonâ fide acted with the intention that they alleged; but the Court were of opinion that the publication of an obscene work was unlawful, and that the publishers of it must be taken to have intended the corruption of morals which would be the natural consequence of such publication.

I will assume, for the present purpose, that the new edition of the "Confessional Unmasked" differs somewhat from the first edition, which was the subject of the decision in *Reg.* v. *Hicklin* (1); but even this edition only professes to omit some of the most filthy and abominable passages in the former edition. It appears to me that quite sufficient remains to make the present case quite undis-

(1) Law Rep. 3 Q. B. 360.

tinguishable from that case. It is no defence that all the obscene part of this new edition consists of passages from the works of Roman Catholic authorities. That does not justify their publication in their present form, nor does it follow that such works might not themselves be equally liable to condemnation. It appears to me, therefore, that the present case falls within the decision in *Reg.* v. *Hicklin* (1), with which decision I most fully concur.

A further question raised by this case is, whether this book is privileged as a fair report of proceedings in a court of competent jurisdiction. It is clear, that in general the publication of fair reports of proceedings in courts of justice, like free discussion of matters of public importance, being considered for the public benefit, is privileged; but it is equally clear that discussions offensive to public decency and of a depraving tendency are not privileged. The law on the subject is well expressed in Starkie on Slander and Libel, 3rd. ed. p. 215, where it is said, "Where the very object of the inquiry is to protect the interests of religion, morality, decency, and good order, by repressing infamous, blasphemous, and obscene or seditious publications, it would not only be impolitic, but weak and absurd, to allow the same matters to be afterwards published with impunity as a parcel of the judicial proceeding." The rule there laid down agrees with the law as stated in *Rex* v. *Carlile* (2), by Bayley, J., as follows: "We are bound, for the purposes of justice, to hear evidence in the course of judicial proceedings, the publication of which at any distant period of time, or at any time afterwards, may have the effect of an utter subversion of the morals and religion of the people. The first time I had occasion to consider this subject was in the case of some trials for adultery. It very often happens that, for the purposes of justice, our ears may be shocked with extremely offensive and indelicate evidence. But though we are bound in a court of justice to hear it, other persons are not at liberty afterwards to circulate it at the risk of those effects which, in the minds of the young and unwary, such evidence may be calculated to produce. I am satisfied that, whenever that point has been under the consideration of this Court, it has always been viewed, and must invariably be

(1) Law Rep. 3 Q. B. 360.

(2) 3 B. & A. 167.

viewed, in the same way." The same rule was laid down in *Rex* v. *Creevey* (1), and there are other authorities to the same effect; but it is unnecessary for me to do more than to express my concurrence with the judgment of Bayley, J., from which I have quoted.

With respect to the circumstances of the present case, I may add that there is a further ground for the exclusion of the privilege. The book now before us publishes in detail offensive passages which were not read aloud at the trial. The outer cover of some of the copies does not even allude to the trial, while it does call attention to the offensive matters contained within. It appears to me pretty clear that the book, as a whole, was not intended to be merely a fair report of a trial, but a means of reproducing the offensive publication under the guise of a report of the prosecution of Mackey for such publication. On these grounds I think it was clearly not privileged, and that our judgment must be for the respondent.

KEATING, J. I am of the same opinion. The book called the "Confessional Unmasked," purports to be a selection from the works of Roman Catholic divines, containing directions for priests in the conduct of the confessional. These extracts, if correct, do appear to me to contain obscenity of a nature from which any mind of ordinary decency must revolt. The appellant contends, through his counsel, that he was entitled to discuss this subject. I agree that such a subject might be one of importance and one which it might be right to discuss as such. But the appellant's counsel went on to contend that it was impossible to discuss it with effect without setting out the extracts to which objection is taken. It was contended that if this was so, and the object was not to pollute the public mind, but to conduct an effective controversy as to a matter of public importance, the publication of these extracts was no misdemeanour at common law. It may be assumed, for the purposes of argument, that the object of the parties was a meritorious one as alleged, but I agree with my Lord Chief Justice that they are not entitled, in order to accomplish such an object, to set forth matter which in itself has a

(1) 1 M. & S. 273.

tendency to corrupt the morals of the public. To adopt the argument for the appellant would be, in truth, to adopt the doctrine assailed in argument by the appellant's counsel and to allow evil to be done that good might follow. It would be strange indeed that in order to prevent the pollution of the public morals the law should allow pollution to be circulated. It was asked, in argument, what remedy there was against works similar to those from which the extracts given in the pamphlet are taken. No such work is now before us judicially, and I pronounce no opinion therefore with respect to any such. It is enough to say that it does not follow that because it is a misdemeanour to publish the present pamphlet that it would not also be a misdemeanour to publish such works as those referred to. In any case, they can afford no argument to justify the present publication. The question then arises whether this book is privileged as a report of proceedings in a court of justice. It is only necessary on this subject to refer to the extract cited by my Lord from Starkie on Libel. The freedom of the press with relation to the proceedings of courts of justice is, doubtless, of the highest importance, and the law does its utmost to protect such freedom, but the law would be self-contradictory if it made the publication of an indecent work an indictable offence and yet sanctioned the republication of such a work under cover of its being part of the proceedings in a court of justice.

For these reasons I think our judgment must be for the respondent, and, I may add, that with respect to the question whether the publication of this book was a misdemeanour, apart from the question of privilege, it appears to me that this case is clearly within the decision in *Reg.* v. *Hicklin* (1) to which, apart from the opinion at which I have arrived from the reason of the thing, I feel bound to defer.

GROVE, J. I am of the same opinion. With respect to the question whether the publication of this book would, apart from any question of privilege, be a misdemeanour, I think the case is clearly within the decision in *Reg.* v. *Hicklin.* (1) We ought not, it seems to me, except upon the strongest grounds, to dissent from that decision. I can see no reason why we should not adopt it. I would only make one remark with relation to it. I do not take the case as involving the proposition against which Mr. Kydd, in his argument, I think rightly, contended, viz. that the intention which really actuated a person is always to be conclusively deduced from the character of the act itself. The effect of the judgment below as a whole seems to me to be that when, from the act committed, an immediate intention of a particular character would be implied the party doing the act is not exempted by reason of some other paramount intention of a different description, which actually operated upon his mind. The only question, therefore, would appear to be, what is the intention which may be fairly implied from the act of offering for indiscriminate sale a work dealing with subjects of a filthy nature.

---

(1) Law Rep. 3 Q. B. 360.

Then it is urged that this was a substantially correct report of a trial. If it were permissible to publish a report of a trial, in which the question was whether certain matter was obscene, and the publication of it a misdemeanour, and to reproduce the whole of such disgusting matter under the cover of such report, the result would be that the person publishing an obscene work would only have to be brought before a court of justice for such publication, in order to entitle him to republish the same matter with perfect impunity. His trial would frustrate the very purpose which it had in view, viz. the putting a stop to the publication of such matter. This consideration appears to me to reduce the appellant's contention to an absurdity. I should, therefore, have no difficulty in coming to the conclusion that this book is not privileged without the aid of authority, but, if any were necessary, *Rex* v. *Carlile* (1) is a distinct authority on the subject. It has been urged that the only effectual remedy at the disposal of parties who bonâ fide wish to expose and counteract the effects of works such as those from which the extracts contained in this pamphlet are taken, is to republish them. There is a simple remedy alluded to by my Brother Keating. The question whether the publication of such works is admissible may be made the subject of a prosecution. I express no opinion as to the character of any of the

(1) 3 B. & A. 167.

1872

STEELE v. BRANNAN.

works alluded to in argument; but I make this remark to shew that the parties objecting to such publications are not without a remedy. Upon such a prosecution the matter would be discussed only before the Court and the jury. It cannot be permissible that persons wishing to expose doctrines of an immoral and pernicious tendency, should give an indiscriminate publicity to details of the nature which the pamphlet now in question contains.

Judgment for the respondent.

Attorney for appellant: *Ellerton.*
Attorney for respondent: *Solicitor to the Treasury.*

May 4.

FOWLER *v.* LOCK.

Master and Servant—Relation of Cab-Proprietor and Driver—Bailor and Bailee.

2 QBD 281-2
6 QBD 687
7 QBD 600
602

The plaintiff, a cab-driver, obtained from the defendant, a cab-proprietor, a horse and cab on the usual terms, which are that the driver shall at the end of the day hand over to the proprietor 18*s*., retaining for himself all the day's earnings over that sum,—the day's food for the horse being supplied by the owner, and the latter having no control over the driver after leaving the yard. The horse with which the driver was furnished, which was fresh from the country and had never before been harnessed to a cab, bolted and overturned the cab and injured the driver. The jury found that the horse was not reasonably fit to be driven in a cab:—

Held, by Byles and Grove, JJ., that the relation between the parties was that of bailor and bailee, and consequently that, upon this finding of the jury, the proprietor was responsible for the injury sustained by the driver.

Held, by Willes, J., that the relation was that of master and servant (or at most co-adventurers), and therefore that, in the absence of evidence of personal negligence or misconduct on his part, the owner was not responsible.

Powles v. *Hider* (6 E. & B. 207; 25 L. J. (Q.B.) 331) observed upon.(1)
2 Jur NS 472

The first count of the declaration stated that the defendant was a proprietor of cabs and horses, and was accustomed to let the same out for hire, and was possessed of a horse which was of a vicious and unmanageable disposition, dangerous, and not fit to be, and had never before been, driven in a cab; that the defendant, well knowing the premises, let the same out to hire to the plaintiff for the purpose of being harnessed to a cab and being therein driven by

(1) New trial directed by Ex Ch because facts not sufficly stated Fowler v Lock LR 10 CP 90

the plaintiff in the way of his, the plaintiff's, occupation of a cab-driver, for reward to the defendant in that behalf, and fraudulently and wrongfully concealed from the plaintiff the fact of the horse being vicious, unmanageable, and dangerous, not fit to be, and that it had never before been, driven in a cab; that the plaintiff had no notice or knowledge of that fact; and that, by reason of the premises, the horse, whilst so hired as aforesaid, and after the same had been harnessed to a cab for the purpose of being, and whilst being, driven therein by the plaintiff in the way of his said occupation as aforesaid, kicked, plunged, reared, and became unmanageable, and bolted and ran away and up an embankment, and overturned the cab; whereby the plaintiff was injured and prevented from following his occupation, &c.

Second count, that, in consideration that the plaintiff would hire of the defendant a horse of the defendant for the purpose of being harnessed to a cab and being therein driven by the plaintiff in the way of his occupation as a cab-driver, for reward to the defendant in that behalf, the defendant promised to let the same to the plaintiff on hire for the purpose and on the terms aforesaid, and that the horse was reasonably fit and proper for the purpose of being driven by the plaintiff; that the plaintiff accordingly hired and the defendant let to hire to the plaintiff the said horse for the purpose and on the terms aforesaid; yet the horse was not then reasonably fit and proper for the purpose aforesaid, and after the same had been harnessed to a cab for the purpose of being driven, and whilst being driven therein by the plaintiff as aforesaid, kicked, &c., as in the first count.

Pleas, 1, to the first count, not guilty; 2, to the second count, that the defendant did not promise, as alleged; 3, to the second count, that the horse was at the time of the making of the supposed promise, reasonably fit and proper for the purpose in the second count alleged. Issue thereon.

The cause was tried before Byles, J., at the second sitting for Middlesex in last Michaelmas Term. The plaintiff is a cab-driver. The defendant is a cab-proprietor carrying on his business in Gray's Inn Road. On the 24th of June last the plaintiff, who had before driven cabs belonging to the defendant, applied to him for a cab and horse for the day, and the defendant agreed to supply them to him upon the usual terms, viz. that the plaintiff should at the end of the day hand over to the defendant 18*s*. of the day's earnings, retaining all over that sum for himself,—the day's food for the horse being supplied by the defendant, and the owner having no control over the driver after leaving the yard. The first horse which was offered to the plaintiff refused to go beyond the gate of the stable-yard; the second lay down in the road three or four times before he had got a mile from home; and then the defendant, pointing to a grey mare,—a well-bred animal, rising five years, fresh from the country, having just been purchased at Horncastle Fair for 26*l*.,—said: "That is a likely one; you may try her if you like." The grey was accordingly harnessed to the cab, and the plaintiff started with her; but in a short time she kicked and plunged and the plaintiff lost all control over her, and ultimately the cab was upset and the plaintiff injured. There was evidence that it was usual, before putting fresh horses to cab work, for the defendant, to try them in a gingle, which in this case had not been done.

The defendant and his foreman were called; the former stated that, before the horses were put to, he told the plaintiff that they were all fresh horses; and both of them swore that they considered the grey a reasonably fit horse for a cab: and it was submitted that there was no evidence to sustain either count of the declaration; that it was not shewn that the defendant was aware of the vicious disposition of the mare; and that the plaintiff, being the servant of the defendant, could not maintain an action against his master for an injury sustained by him whilst in his service, in the absence of evidence of some act of negligence of the master which conduced to it.

The learned judge directed a verdict to be entered for the defendant upon the first count; and upon the second he left it to the jury to say whether the horse was reasonably fit for a cab, and whether the accident was attributable to the vice of the horse or to the plaintiff's carelessness or want of skill.

The jury found that the horse was not reasonably fit to be driven in a cab, and that the accident was attributable to the horse; and they accordingly found for the plaintiff on the second count, damages 50*l*.

1872

FOWLER
v.
LOCK.

Francis, in Michaelmas Term last, pursuant to leave reserved at the trial, obtained a rule nisi to enter a verdict for the defendant or a nonsuit, on the ground that the plaintiff was the servant of the defendant, and there was no hiring or letting of the horse, as alleged in the second count; or that, if there were such hiring or letting, there was no implied promise that the horse was reasonably fit and proper for the purpose as alleged; or for a new trial, on the ground that the verdict was against the weight of evidence, —the plaintiff to be at liberty, on the argument of the rule, to contend that the judge was wrong in telling the jury that there was no evidence to support the first count.

Jan. 19. *Collins* shewed cause, and contended that, although the cab-owner is liable to the public for any negligence on the part of the driver,—*Powles* v. *Hider* (1),—it did not follow that the driver was his servant; that the true relation between them was that of bailor and bailee; that the owner could sue the driver for the stipulated hire; and that there was an implied warranty on the part of the owner, as in the case of any other bailment for hire, that the horses he let out were reasonably fit for the work. He cited Story on Bailments, § 332; Addison on Contracts, 3rd ed. 431-2; Oliphant on Horses, 2nd ed. 54; *Chew* v. *Jones*. (2) He also contended that there was some evidence to go to the jury on the first count, of the defendant having fraudulently concealed from the plaintiff the fact that the mare had never been tried in harness.

Jan. 20. *Francis,* in support of the rule, contended, upon the authority of *Morley* v. *Dunscombe* (3), *Dynen* v. *Leach* (4), and *Powles* v. *Hider* (1), that the relation between the defendant and the plaintiff, under the circumstances proved, was that of master and servant, and consequently that, in the absence of evidence of personal misconduct on the part of the owner, he was not liable for any injury which the driver might sustain whilst in his employ; that the arrangement as to the division of the day's earnings was merely a mode of paying wages, resorted to for the purpose of guarding against the idleness or the fraud of the driver; and that the relation of the parties could not be different inter se and as between one of them and the public. He also relied upon the following sections of the Hackney Carriage Acts, as shewing that the legislature contemplated the relation of master and servant between the cab-proprietor and the driver:—1 & 2 Wm. 4, c. 22, s. 20; 6 & 7 Vict. c. 86, ss. 21, 23, 24, 27, 28. He further cited Story on Bailments, § 390, Chitty on Contracts, 9th ed. 418, *Bigge* v. *Parkinson* (1), and *Sutton* v. *Temple* (2), to shew that there was no implied warranty on the part of the master under the circumstances.

---

(1) 6 E. & B. 207; 25 L. J. (Q.B.) 331. 2 Jur NS 472

(2) 10 L. T. 231.

(3) 11 L. T. 199.

(4) 26 L. J. (Ex.) 221.

Cur. adv. vult.

May 4. The Court being divided in opinion, the following judgments were delivered:—

GROVE, J. In this case the two questions which remained to be decided were,—first, was the plaintiff the servant of the defendant in such sense that, within the decided cases on that subject, he, the plaintiff, could not recover in respect of injuries sustained in the ordinary course of his employment,—secondly, supposing the relation of master and servant in that sense did not exist, but that the relation was analogous to that of bailor and bailee, was there an implied contract by the former that the thing hired was reasonably fit for the purpose for which it was hired.

The evidence at the trial was that the plaintiff was the driver of a cab, and the defendant the cab-owner. The cabman in these cases pays 18*s.* a day, taking the risk of profit or loss upon himself. If he does not bring home or pay the 18s., he is not allowed to drive again; or, in the words of the defendant, "No money, no cabs." During the day the cabman is free to do what he likes with horse and cab, provided he does not ill use them or misconduct himself to the public. On the occasion in question, the defendant, who supplied cab and horse, supplied first a horse which could not be made to go further than the exit of the stable-yard, secondly a horse which lay down three or four times, and

---

(1) 7 H. & N. 955; 31 L. J. (Ex.) 301.

(2) 12 M. & W. 52.

1872

FOWLER
v.
LOCK.

thirdly the horse which caused the injury to the driver in question by violent kicking and bolting.

There was evidence that the third horse was what is called "green," i.e. fresh from the country, and untried, and that it was usual in such cases to try the horse first in what is called a gingle.

The learned judge held that there was no evidence of knowledge to support the first count, and left the case to the jury reserving the question above mentioned. The jury found for the plaintiff, damages 50*l.* With this verdict the learned judge was not dissatisfied; and this Court held on the argument that he was right as to the want of evidence of scienter.

It was contended on behalf of the defendant, on the authority of the cases of *Morley* v. *Dunscombe* (1) and *Powles* v. *Hider* (2), that the plaintiff was the servant of the defendant, and that, within the decisions on the subject, the master was not liable to the servant for injuries sustained in the ordinary course of service. On the other hand, it was argued on behalf of the plaintiff that those were cases where a third party, viz. one of the public, was injured; and that, although the cab-owner might, by reason of statutable provisions and responsibilities to the public, be liable to a person injured when riding in the cab, yet that they were not in point as to the relations of cab-owner and cab-driver; and that these were to each other as bailor and bailee on a contract of hiring. It was further contended for the defendant that, even if the latter relation was the true one, there was no implied promise by the cab-owner that the horse supplied was reasonably fit for the purpose for which it was used, and, if so, the defendant was not liable.

On both these reserved questions, I am of opinion that the judgment should be for the plaintiff.

The non-liability of master to servant in cases where a stranger would be liable, appears to be founded on the servant's undertaking or subjecting himself to the ordinary risk of his service, the "dangers" of which "he is just as likely to be acquainted with as the master." These latter words are used in the judgment of the Court of Exchequer delivered by Lord Abinger in the leading case

---

(1) 11 L. T. 199.

(2) 6 E. & B. 207; 25 L. J. (Q.B.) 331.

2 Jur NS 472

1872

FOWLER
v.
LOCK.

on the subject, *Priestley* v. *Fowler* (1), in which case the injury was occasioned by the breaking down of an overloaded van; and the judgment went on to say (2): "The plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail, would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others employed under the same master, than any recourse against his master for damages could possibly afford." In *Dynen* v. *Leach* (3), where the injury was by the slipping of a clip to which a sugar-mould was attached, Bramwell, B., says,—and similar expressions fell from other members of the Court,—"The workman is as well acquainted as the master with the nature of the machinery, and voluntarily uses it." These criteria, I do not think apply to the present case. The cabman could not know the qualities of the different horses he was or might be from day to day supplied with; nor was he the cab-owner's servant, in the sense of taking upon himself perils the nature or extent of which he had no reasonable means of ascertaining.

In *Powles* v. *Hider* (4), relied on for the defendant, where the question was more fully entered into than in *Morley* v. *Dunscombe* (5), the judgment proceeds on the relation to the public of the cab-owner. It says (6): "Looking to the position of the proprietor and the driver of a cab under the circumstances proved, and to the Acts of Parliament which regulate their respective duties, we are of opinion that the driver is to be considered the servant *or agent* of the proprietor, with authority to enter into contracts for the employment of the cab, on which the proprietor is liable." After discussing the question of wages, to which I shall

---

(1) 3 M. & W. 1.

(2) At p. 7.

(3) 26 L. J. (Ex.) 221.

(4) 6 E. & B. 207; 25 L. J. (Q.B.) 331. 2 Jur N.S. 472.

(5) 11 L. T. 199.

(6) 6 E. & B. at p. 212. 2 Jur NS 43

1872

FOWLER
v.
LOCK.

presently refer, the judgment proceeds to contrast that case with the hiring of a job-carriage, "where the hirer becomes bailee, and can in *no sense* be considered the servant of the proprietor." It then considers the provision of the statute 1 & 2 Wm. 4, c. 22, s. 20, viz. that every hackney-carriage shall at all times have upon it a plate with the Christian name and surname of the proprietor of such carriage. The Court goes on to say, "and the cab in question had upon it a plate with the name and surname of the defendant as the proprietor. The proprietor who applies for and accepts a licence to which such a condition is annexed, and employs his cab under it, *must be considered to hold himself out to the world as the proprietor*; and he must incur the *liabilities* of the proprietor *to all* who use the cab with the authority of the driver in the ordinary course of dealing." After referring to 6 & 7 Vict. c. 86, it says (1), "It would be most inconvenient and unjust towards the public if an action such as the present, brought against one who *proclaimed* himself to be the actual proprietor of the cab when it was engaged by the plaintiff, could be defeated by evidence of a secret agreement between the proprietor and the driver with respect to the remuneration of the driver and the proprietor, in which the earnings of the cab are to be divided between them."

I think it sufficiently appears from the above that what the Court had under its consideration in that case was the relation and responsibility of the cab-proprietor to the public; and that it had not in view the nature of the contract between the cab-owner and the driver or cabman. Indeed, this seems to be excluded by the part of the judgment last quoted. The Court, it is true, considered the payment of a fixed sum as a mode of compensation for the cabman's labour: and no doubt this may be so; but the payment by the person who uses the horse and carriage to the proprietor of it, though not inconsistent with such a view, cannot, I think, be regarded as evidence of a contract of service, but rather (primâ facie, at least,) as more consistent with that of a contract of hiring.

In this case, therefore,—where the cabman is under no control as to his movements by the cab-owner, where he may make special bargains with the public, where he does not and cannot reasonably

(1) 6 E. & B. at p. 214. 2 Jur. N.S. 473.

be expected to know the risks he encounters, where he primâ facie pays instead of receives, where he is not carrying out his master's orders, where the perils are unknown to him and change from day to day, where there is no notice of dismissal, but only a refusal to supply cab and horse on non-payment, and where there are no correlative duties beyond those of bailor and bailee, and statutable duties of each respectively to the public,—I feel obliged to come to the conclusion that the cabman is not the servant of the cab-owner in the *sense* (to use the term above quoted) of rendering the latter exempt from liability to the former in cases where a party not bearing the relation of master to servant would be liable.

It remains for me to consider the second point, i.e. assuming the relation of the parties to be in the nature of that of bailor and bailee, is there an implied contract by the former that the thing supplied is reasonably fit for the purpose for which it is hired. I am of opinion that there is.

Even in the case of master and servant, the House of Lords has held, in appeals from Scotland, that the master is bound to take all reasonable precautions for the safety of his workmen, and is liable for accidents occasioned by his neglect towards those whom he employs: and the law of England is there stated (obiter) to be the same as that of Scotland: *Paterson* v. *Wallace* (1); *Brydon* v. *Stuart.* (2)

In *Chew* v. *Jones* (3), it is laid down at nisi prius, by Pollock, C.B., that, "if a horse or carriage be let out for hire for the purpose of performing a particular journey, the parties letting warrant that the horse or carriage, as it may be, is fit and proper and competent for such journey." He says, however, further on: "It is not the case of a bailee, but of a contract in which the plaintiff impliedly warrants that his horse is fit to do a certain journey."

In the judgment of Lord Abinger in *Sutton* v. *Temple* (4), it is said (5): "If a carriage be let for hire, and it breaks down on the journey, the letter of it is liable and not the party who hired it. So, if a party hire anything else of the nature of goods and chattels, can it be said that he is not to be furnished with the proper goods,—such as are fit to be used for the purpose intended? Undoubtedly, the party furnishing the goods is bound to furnish that which is fit to be used. In every point of view the nature of the contract is such that an obligation is imposed on the party letting for hire to furnish that which is proper for the hirer's accommodation." *Smith* v. *Marrable* (1), which was the case of letting a house infested with bugs, and where the Court said that there was an implied condition in letting a house that it was reasonably fit to be inhabited, was distinguished from the case then under consideration, and therefore so far upheld. The words first quoted from this judgment seem exactly to meet the present case: and I am consequently of opinion that, where there is a hiring of goods, not agreed to as specific chattels, and where, as here, the person hiring has no reasonable means of ascertaining their quality, the hirer is bound to supply such as are reasonably fit for the purpose.

---

(1) 1 Macq. 748.

(2) 2 Macq. 30.

(3) 10 L. T. 231.

(4) 12 M. & W. 52.

(5) 12 M. & W. at p. 60.

My judgment is therefore on both points for the plaintiff, an that the rule should be discharged.

BYLES, J. I also am of opinion that the rule to enter a nonsuit should be discharged.

It may be useful to consider in what relation the parties would have stood to each other before the Hackney Carriage Acts were passed, or in places where they do not apply. Suppose that in a country town, in the time of Charles I., the owner of a horse and cart contracted to allow another man to have the entire and exclusive personal use and control of them, at so much a week or so much a day, for the purpose of carrying, for the driver's profit, passengers or goods within the limits of the town, but without reserving to himself (the owner) any right to direct where the horse and cart should go, provided they were used within the prescribed limits and were returned within the agreed time,—what in that case would have been the nature of the relation between the parties? I should have thought it would not have been that of master and servant, but would have been that of bailor and bailee. The contract would fall within that class of bailments called "Locatio, i.e. contractus quo de re fruendâ vel faciendâ pro

---

(1) 11 M. & W. 5.

1872

FOWLER v. LOCK.

certo pretio convenit." It may not be necessary to the existence of a bailment of this sort that the possession of the chattel should vest in the bailee; it is enough if he have only the use and enjoyment of it. It would in either view still be a bailment, though he should be obliged to use it within the prescribed limits, and to drive it himself personally, and not to allow any one else to do so.

Such I should have thought would have been the relation existing between the parties in this case, but for some expressions used by Lord Campbell in the case of *Powles* v. *Hider* (1), which expressions, however, not being necessary to the decision of the case, are perhaps extrajudicial; for, it must be recollected that the case of *Powles* v. *Hider* (1) was decided on the Hackney Carriage Acts there cited, and on the relation created by those Acts as between the proprietor and the public. Here, on the contrary, we are dealing with the rights and liabilities of the proprietor and driver inter se. The driver, as between the cab-owner and himself, seems to me to have the complete and exclusive control and disposition of the vehicle within a certain district, and not to be a servant of the proprietor, and therefore by the terms of the contract entitled to be furnished with a suitable, at least with a quiet or manageable, horse.

But, even on the supposition that the relation existing between these parties inter se was not analogous to that of bailor and bailee, but was that of master and servant, I think, nevertheless, that there was evidence of the defendant's liability; for, in this case, there was the personal interference and superintendence of the master, the now defendant, in the supply of the horse, and therefore evidence of his personal negligence causing injury to his servant, by sending the servant out with an untried, vicious, and dangerous horse, not reasonably fit and proper for the work; the master having had the means of knowing the horse's character, and the servant having had no such opportunity.

In *Ormond* v. *Holland* (2) Lord Campbell and Crompton, J., both state, as a qualification to the general rule laid down in *Priestley* v. *Fowler* (3), that the master is liable if there be personal negligence on his part.

(1) 6 E. & B. 207; 25 L. J. (Q.B.) 331.

(2) E. B. & E. 102.

(3) 3 M. & W. 1.

(1) S C 2 Jur N S. 472

Moreover, it has been held, and very recently in this Court in *Warren* v. *Wildee* (1), that a master is liable to his servant if he expose the servant to unreasonable risk, and the servant be thereby injured, and that this is a question which ought to be left to the jury.

Willes, J. In this case the plaintiff, who was a cabman driving a horse and cab provided by the defendant, a cab-master, the cabman keeping the earnings of the cab, and paying so much a day to the cab-master, upon the terms usual in the trade, and which were of the same character as those commented upon in *Powles* v. *Hider* (2), was hurt in consequence of the horse running away; and he brought his action for damages.

The declaration contained two counts. One count alleged that the defendant knowingly supplied an unfit horse: this, however, was rightly negatived at the trial, and the verdict thereupon is for the defendant. The other count was upon an alleged implied contract by the defendant with the plaintiff, upon an alleged bailment of hire of the cab and horse, that the horse was fit for the purpose, which in fact he was not. Upon this count the plaintiff had a verdict, subject to the opinion of the Court upon a point reserved; and the question which we have to determine is, whether this contract was to be implied from the employment.

The character of the relation between the parties was much considered in *Powles* v. *Hider* (2), which decided that the cab-master was answerable to third persons for the acts of the cab-driver, as his servant or agent, and that the cabman was not the bailee or hirer of the cab, in which case he, and not the cab-master, would have been liable. In delivering the judgment of the Court, Lord Campbell distinctly stated this to be the opinion at which they had arrived; and in deciding this case against the defendant we should seem directly to overrule the reasoning of the Court of Queen's Bench. The passage in Lord Campbell's judgment runs as follows: (3)—"If the defendant be right in his contention that, in point of law, the cab and horses must be considered as let to hire to Young, the driver, for fifteen hours, in consideration of the sum of 14*s.* 6*d.*, and that Young must be considered the bailee and entitled to make what use he pleased of them during that time, Young could not render the defendant liable on any contract into which he entered for the use of the cab, and the plaintiff, being without remedy against the proprietor, could only sue Young, the driver and bailee. But, looking to the position of the proprietor and the driver of a cab under the circumstances proved, and to the Acts of Parliament which regulate their respective duties, we are of opinion that the driver is to be considered the servant or agent of the proprietor, with authority to enter into contracts for the employment of the cab, on which the proprietor is liable. There can be no doubt that this would be so if the driver were engaged at fixed wages, accounting to the proprietor for all the earnings of the cab. But, must not the actual arrangement between them be equally considered a mode by which the proprietor receives what may be estimated as the average earnings of the cab, minus a reasonable compensation to the driver for his labour? To stimulate the industry and zeal of the driver, he is allowed to pocket all the earnings of the cab above a given sum; but it is from the earnings of the cab that this sum is paid; and it is evidently calculated on both sides that the earnings of the cab will exceed this sum, which varies, according to the season of the year. This is quite different from hiring a job-carriage or a carriage and horses to be driven by the hirer or his servant, where the hirer becomes bailee, and can in no sense be considered the servant of the proprietor."

---

(1) Law Rep. W. N. 1872, p. 87.

(2) 6 E. & B. 207; 25 L. J. (Q.B.) 331.
2 Jur N.S. 472.

(3) 6 E. & B. at p. 212.
2 Jur N.S. 473.

That case has remained ever since to the present day the unquestioned guide of the Courts, both as to the decision and as to the reasoning upon which it was founded; and the relation between the parties as thereby established was, that the cabman drove the cab for the cab-master as a person employed by him at his risk, and that the payment of the fixed sum was part of a mode of paying wages out of the earnings of the cab, arranged so as to secure to the master a fair return and to the driver a fair rate of wages dependent upon his diligence. The possibility that the cabman might become liable to pay the fixed sum though he did not use the cab, or though he made less than the stipulated sum, was looked upon as a remote possibility not contemplated by

1872

FOWLER
v.
LOCK.

the parties, who were considered to have bargained with reference to the average earnings. In such an engagement the cabman himself is to drive, which is a confirmatory fact to shew that the engagement is personal with him for his service; and it is anticipated that he will, in return for such service, make as much as will pay him fair wages over and above what is secured for the master.

The question is somewhat like that which has arisen in case of servants of a partnership receiving a share of the profits, with this distinction, that, whether in the case of a servant or in the case of a partner contributing his labour as against capital advanced by another to the earning of joint profit, whether fixed or not, an agency is created in respect of which the contributor of the capital is a principal or co-adventurer, and the contributor of the labour is a servant or other co-adventurer, each taking his share in profit and risk. A person standing in such a position as employer or co-adventurer is, according to a well-known rule, only answerable for fraud or misconduct, and the person employed by him takes the ordinary risks of the employment.

It would be a remarkable hardship to hold that the cab-master is not a letter out of the cab, but a principal, and liable for the cab-driver as his servant or agent as regards third persons, and yet that he is not an employer, but an independent letter to an independent hirer, as between him and the cabman, so as to be liable to the latter as upon a warranty which is not implied between master and servant or agent, or between co-adventurers.

The legislation upon the subject of hackney cabs has been relied upon as justifying us in putting this double face upon the transaction; but the effect of that legislation is, to recognize and stamp upon the transaction the character of an employment in which the cabman is a servant, and to make the proprietor liable for him as such. The cabman is aware, or ought to be, that he enters into such a bargain as makes him in point of law the driver of the cab-master; and, in acting upon that employment, he acquires no greater right against his employer than if he were the coachman of a private gentleman, whose claim under like circumstances would at once have been rejected: *Priestley* v *Fowler*. (1)

---

(1) 3 M. & W. 1.

The class of exceptional cases in which a master has been held liable for injuries caused to his servant by improper and dangerous implements or materials used in his service, is limited to those in which the master has known of the defect (the servant being ignorant of it) and has shewn a reckless disregard of the safety of the servant, as in *Williams* v. *Clough* (1), *Roberts* v. *Smith* (2), where there was proof that the master knew of the dangerous character of the materials. To say that such a liability existed in this case, would be to depart from the declaration, which contains no count to raise the question, and to import a question not submitted to the jury, and to overrule *Hammack* v. *White* (3), where it was held that trying a newly-purchased horse in the street was not evidence of negligence even as against an ordinary passer-by.

It is unnecessary to give an opinion, and I offer none, upon the question whether there is an absolute warranty of fitness as between letter and hirer, in the case of an ordinary bailment of hire. It is enough to say that in the present case there can be no such warranty, because there was no such bailment.

If the cab-owner had been guilty of knowingly sending out an unfit horse with a driver who was not aware of the fact, there would have been a case of liability; but this state of facts was negatived at the trial. The remaining alleged ground of liability is therefore within the ordinary risk of the employment which the plaintiff undertook.

My learned Brothers Byles and Grove are of a different opinion, and therefore these scruples of mine are of small weight; but I have not been able to get rid of them. In accordance with the judgment of the majority of the Court, the rule to enter a nonsuit or a verdict for the defendant must be discharged.

Rule discharged.

Attorney for plaintiff: *F. Scarth.*
Attorney for defendant: *W. H. Orchard.*

(1) 3 H. & N. 258; 27 L. J. (Ex.) 325.

(2) 2 H. & N. 213; 26 L. J. (Ex.) 319. 3 Jur N.S. 469

(3) 11 C. B. (N.S.) 588; 31 L. J. (C.P.) 129.

PHILLIPS *v.* ROUTH.

May 4.

Interrogatories—Hearsay Information—Privilege—Information obtained for the purposes of Litigation.

22 QBD/6
168

In an action by a principal against his agent, for negligence in the purchase of certain goods for the principal, the defendant being interrogated touching certain matters connected with such purchase not within his own knowledge, but known to his partner at New York, declined to answer on the ground of ignorance as to such matters. Further interrogatories being administered, touching the same matters, he answered, stating that since action brought, certain communications had passed between him and his firm at New York, with a view to his defence to the action, and that all his information as to the matters in question was derived from such communications, and submitting that he was privileged from disclosing such communications:—

Held, on an application to the Court to compel him to make further answer to the interrogatories, that he was so privileged, and that the application must be refused.

APPLICATION that the defendant might be ordered to make further answer to interrogatories, or be examined orally before a master.

The facts were as follows: The action was brought by the plaintiff against the defendant for alleged negligence in the purchase of certain pork, which the plaintiff had employed the defendant, as his agent, to procure for him in America. The defendant and his brother carried on business, in partnership at New York, as commission and general merchants. The defendant had accepted an order from the plaintiff for the purchase, on plaintiff's behalf, by the firm, of pork to be shipped from New York.

Interrogatories were administered to the defendant by the plaintiff, one of which asked whether the pork in question was supplied by the defendant's own firm, or, if not, from what persons it was obtained; how long the pork had been in defendant's possession; when it was killed, &c.

To this interrogatory the defendant answered, stating that to the best of his belief his firm did not supply the pork; that he never had it in his possession; and that he could not of his own knowledge depose to any of the other matters inquired after.

A commission was subsequently obtained to examine witnesses

1872

PHILLIPS
v.
ROUTH.

at New York on behalf of the defendant. The defendant's brother presented himself as a witness for examination at New York, and admitted on cross-examination that he had in his possession bills, letters, &c., relating to the pork in question, but refused to produce them.

Upon this the plaintiff obtained leave to further interrogate the defendant with respect to the particulars in question. To this further interrogatory defendant replied, stating that before action brought he had no knowledge as to the matters inquired into, and was unable to answer as to them from his own knowledge; that subsequently to the commencement of the action communications had passed between him and his firm at New York, by letter and telegram, upon the matters in dispute in the action, and with a view to his defence to the action; and his only knowledge or information as to the matters inquired about was derived from the contents of such communications; and he submitted that he was not bound to state the contents of such communications. An application was then made to Willes, J., at chambers, to compel the defendant to answer further, but was dismissed.

April 23. *Murphy* moved for a rule nisi as above. The defendant, having the means of answering at his command when the first set of interrogatories were delivered, was not entitled to refuse to answer, and he cannot be absolved from his liability to do so because he has subsequently obtained the necessary information in the course of preparation for his defence to the action. The defendant is, it must be observed, the plaintiff's agent. It is the ordinary course of business that this information should be communicated.

C.B.
12 QBD/164

[BRETT, J. Is there any obligation on a party interrogated to answer what he does not himself know? Is he bound to procure information for the purpose of answering? The case of interrogatories is not like that of production of documents, where the party is bound to procure the documents for inspection if they are in his own control.]

Suppose a merchant in London is interrogated as to matters with respect to which he has only to write to his agent at Liverpool to obtain complete information, can he absolve himself from answering by saying that he has no knowledge of such matters? The same case occurs in interrogating a corporation.

[BOVILL, C.J. You interrogate a corporation through its officials.]

The answer to the interrogatory is not such as would be held sufficient in a Court of Chancery.

[BOVILL, C.J., referred to the *Chartered Bank of India* v. *Rich.* (1)]

That case is distinguishable. There the information asked for was clearly privileged. Here the information was such as the defendant was bound originally to give; and it can make no difference that he has since obtained it with a view to his defence.

[He cited *Goodall* v. *Little* (2); *Woolley* v. *North London Ry. Co.* (3); *Attorney-General* v. *Rees* (4); *Parr* v. *London, Chatham, and Dover Ry. Co.* (5); *Read* v. *Langlois.* (6)]

Cur. adv. vult.

May 4. The judgment of the Court (Bovill, C.J., Keating, Brett, and Grove, JJ.,) was delivered by

BOVILL, C.J. This case comes before us by way of appeal from the decision of Willes, J., at chambers, refusing to order the defendant to give further answers to certain interrogatories. The ground set up by the defendant for refusing to answer was, that he was privileged with respect to the matters inquired about, inasmuch as the information which he possessed concerning such matters was derived from communications which had taken place between himself and his brother with a view to his defence to the action. We think that this case falls within the authority of the *Chartered Bank of India* v. *Rich* (1); and that the defendant is not bound to disclose information obtained for the purposes of the litigation in which he was engaged.

Rule refused.

Attorneys for plaintiff: *Cox & Sons.*

---

(1) 4 B. & S. 73; 32 L. J. (Q.B.) 300.

(2) 1 Sim. (N.S.) 155; 20 L. J. (Ch.) 132.

(3) Law Rep. 4 C. P. 602.

(4) 12 Beav. 50.

(5) 24 L. T. (N.S.) 558.

(6) 1 Mac. & G. 627; 19 L. J. (Ch.) 337.

1872
May 7.

SIMPSON AND ANOTHER *v.* BLUES AND ANOTHER.

County Court—Admiralty Jurisdiction—Claim for Breach of Charterparty—31 & 32 Vict. c. 71—32 & 33 Vict. c. 51, s. 2—Prohibition.

3 A & E. 568,
570-3
— 577.
5 PC 141-3-5
146, 152-4
9 QB. 116
10 Ex 65, 7-8
72-3
~~[illegible] 380~~
4 A & E 380
1 CPD. 172
2 PD 164, 173
5 Ex D 227-9
230-1.
7 PD 250

By 32 & 33 Vict. c. 51, s. 2, it is enacted that "Any county court appointed, or to be appointed, to have Admiralty jurisdiction, shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes: 1. As to any claim arising out of any agreement made in relation to the use or hire of any ship, &c., provided the amount claimed does not exceed 300*l.*":—

Held, that this section does not give the county court Admiralty jurisdiction in respect of a claim for breach of a charterparty, such claim being one over which the High Court of Admiralty would have no jurisdiction, on the ground that the intention of the Act is not to give the county court Admiralty jurisdiction in cases where the High Court of Admiralty would not have had jurisdiction, but only to give to the county court a portion of the jurisdiction of the High Court of Admiralty.

APPLICATION for a prohibition to the County Court of Lancashire from further proceeding in a suit in the said court against a ship called the *Madge Wildfire* and her owners, wherein William Muirhead Simpson and Francis George Carvill were plaintiffs, and the said ship's owners defendants, and from further proceeding in the matter of the arrest and detention of the said ship and continuing the arrest, on the ground that the Court had no jurisdiction to hear and determine the said suit.

The facts as appearing on the affidavits were as follows:—

The *Madge Wildfire* was a British ship registered at South Shields, and Blues' (the owner's) domicile was at South Shields.

A suit had been commenced in the county court of Lancashire having Admiralty jurisdiction against the owners of the ship, and a summons in this suit nailed on the mast of the ship.

The plaint note stated that the suit was for damages for short delivery of cargo, arising out of an agreement or charterparty made in relation to the use and hire of the ship *Madge Wildfire*, dated the 27th of February, 1871, against the bark or vessel called the *Madge Wildfire*, then lying in the Sandon Dock in the port of Liverpool, and against the owner or owners thereof in the sum of 41*l.*

Disapproved of. Cargo ex Argos, The Hewsons
LR. 3 A & E. 568. 5 PC. 134.

The vessel was, subsequently to the commencement of the suit, arrested under process of the county court.

An application was made at chambers for a prohibition to the county court, and referred by Hannen, J., to the court.

It was stated in the affidavit of the ship's captain, that all the cargo, consisting of timber, which had been loaded at the port of lading, was delivered at the port of discharge; but in consequence of the mode of measurement adopted at the port of discharge differing from that adopted at the port of lading, the amount of timber discharged appeared to be less than that loaded.

F. M. White moved for a rule as above. The county court has no jurisdiction in this matter. The claim is for non-delivery of cargo under a charterparty. It must be admitted that such a claim is primâ facie within the words of 32 & 33 Vict. c. 51, s. 2 (1), but it is contended that the Act must be construed with relation to the previous legislation on the same subject, and that it could not be intended to give the county court a wider jurisdiction than that of the High Court of Admiralty itself. That Court has no jurisdiction over such a claim as the present. This is clearly not a case of damage done to goods by negligence or breach of duty or contract within 24 Vict. c. 10, s. 6. The 32 & 33 Vict. c. 51, is to be read as one with the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71). It has been decided that the Act does not give to the county court a wider jurisdiction than that of the Admiralty Court: *Everard* v. *Kendall* (2); *The Dowse.* (3) The Act of 32 & 33 Vict. c. 51, is an Act to amend the former Act, and is entitled the " County Courts Admiralty Jurisdiction Amendment Act."

---

(1) By the 32 & 33 Vict. c. 51, s. 1, it is enacted that "This Act may be cited as the County Courts Admiralty Jurisdiction Amendment Act, 1869, and shall be read and interpreted as one Act with the County Courts Admiralty Jurisdiction Act, 1868."

Sect. 2. "Any county court appointed, or to be appointed, to have Admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes: 1. As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also as to any claim in tort in respect of goods carried in any ship, provided the amount claimed does not exceed 300*l*."

(2) Law Rep. 5 C. P. 428.

(3) Law Rep. 3 A. & E. 135.

1872

SIMPSON
v.
BLUES.

[BRETT, J. In *Everard* v. *Kendall* (1) it was held that there were no words in the County Courts Admiralty Jurisdiction Act, 1868, or in the subsequent Act, giving jurisdiction to the county courts over cases of collision over which the Court of Admiralty would have no jurisdiction; but the question is, what the words in 32 & 33 Vict. c. 51, s. 2, include?]

In *Everard* v. *Kendall* (1), as in this case, there were words large enough to include the claim, but the arguments used in that case, to shew the impossibility of the legislature intending to give wider jurisdiction to the county court than the Admiralty Court, equally apply to the present case.

Clarkson shewed cause in the first instance. This claim was plainly within the words of 32 & 33 Vict. c. 51, s. 2. Where there is ambiguity in the language used by an Act of Parliament, recourse may be had for its interpretation to considerations derived from other Acts and the general law relating to the same subject-matter, but when the words are plain and distinct their ordinary meaning must be given to them. To what claims can the words of 32 & 33 Vict. c. 51, s. 2, refer, unless they refer to a claim such as that in the present case? The case of *The Swan* (2) is an authority in favour of the plaintiffs. He cited *The Dantzig* (3); *The St. Cloud* (4); *The Kazan* (5); *The Nuova Raffaelina.* (6)

F. M. White, in reply.

Cur adv. vult.

May 7. The judgment of the Court (Willes, Byles, Brett, and Grove, JJ.) was delivered by

BRETT, J. This was a rule moved by Mr. Meadows White, calling on the plaintiffs to shew cause why a writ of prohibition should not issue to the County Court of Lancashire, holden at Liverpool, to prohibit the Court from further proceeding in a suit against the ship the *Madge Wildfire*, and the defendants her owners, and from further proceeding in the matter of the arrest and detention of the ship, &c. Cause was shewn against the rule in the first instance by Mr. Clarkson. The suit was commenced in the county

---

(1) Law Rep. 5 C. P. 428.

(2) Law Rep. 3 A. & E. 314.

(3) Bro. & Lush. 102; 32 L. J. (P. M. & A.) 164.

(4) Bro. & Lush. 4.

(5) Bro. & Lush. 1; 32 L. J. (P. M. & A.) 97.

(6) Law Rep. 3 A. & E. 483.

Affm. M.S. 235.

1872

SIMPSON v. BLUES.

court having Admiralty jurisdiction under the statutes 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, by a plaint in which the nature of the suit was declared to be for damages for short delivery of cargo arising out of an agreement or charterparty made in relation to the use and hire of the *Madge Wildfire,* and in which the suit was stated to be brought on behalf of the plaintiffs against the bark or vessel the *Madge Wildfire,* and against the owner or owners thereof, unknown, &c. The plaint was nailed to the mast of the ship in the Sandon Dock at Liverpool. A summons to enter an appearance to the suit was served on the defendant Blues. He was resident and domiciled at Sunderland. The ship, on an affidavit of the plaintiff that she was about to leave, was arrested and detained. It was admitted in the argument that the only cause of action was an alleged breach of the charterparty, and that the claim of the plaintiff was founded on his being a party to the charterparty. On the one side it was argued that the county court had not jurisdiction over such a claim by virtue of s. 2 of 32 & 33 Vict. c. 51, because on comparing that section with others in the same statute and in the statute 31 & 32 Vict. c. 71, which statutes are to be read as one, and considering the general apparent object of the statute, viz. to allow to the county court a part limited as to amount of existing Admiralty jurisdiction, and considering further the effect which would be produced if the words were read in so large a sense as suggested of indirectly enlarging the jurisdiction of the High Court of Admiralty, with which the legislation does not profess to deal, and considering the effect which would be produced on the business relations of merchants, it would be a wrong interpretation to construe the words so as to give jurisdiction in the present case. On the other side, it was contended that there was no sufficient ground for construing the words otherwise than in the largest sense they seem to import. The words relied upon in support of the jurisdiction are as follows: "Any county court appointed, &c., shall have jurisdiction and all powers and authorities relating thereto to try and determine the following causes: 1. As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also as to any claim in tort in respect of goods carried in any ship, provided the amount claimed does not exceed

300*l*." These words read apart from qualification by the context are undoubtedly large enough to create a new jurisdiction in respect of a claim as for a breach of charterparty. The question is, whether their meaning is limited by the subject-matter, and the context goes to exclude such a claim. The High Court of Admiralty has no original jurisdiction to entertain such a case as the present, and no statute has conferred on the High Court of Admiralty any original jurisdiction to entertain any claim as for a breach of charterparty. It follows that if the claim had been in excess of 300*l*. neither the High Court of Admiralty nor the county court would have had any jurisdiction to entertain it. Yet, if the county court has jurisdiction to try such a case when the claim does not exceed 300*l*., it seems difficult to say that, by virtue of s. 26 of 31 and 32 Vict. c. 71, the High Court of Admiralty has not a secondary jurisdiction to determine the case by way of appeal, and might not by virtue of s. 6 assume, by removing the case into the High Court, a quasi original jurisdiction. Nay, if the rule of construction to be applied to these statutes is that the words are to be read in their largest sense, a suit for breach of charterparty with a claim in excess of 300*l*. being brought in the county court might be removed under s. 6 of 31 & 32 Vict. c. 71 into the High Court of Admiralty, and be there entertained, tried, and determined. In the case of *The Swan* (1), the judge of the High Court of Admiralty held that if the County Court Act (32 & 33 Vict. c. 51), does give jurisdiction to the county court to deal with a claim for demurrage, it follows that the High Court of Admiralty may transfer the suit and entertain and determine it under s. 6 of 31 & 32 Vict. c. 71, although the High Court of Admiralty has no jurisdiction to deal with a claim for demurrage.

"It is true," says the learned judge, "that this Court has no jurisdiction to entertain a cause of this nature in the first instance; but if the legislature has given to this Court power to transfer the cause, it has thereby conferred upon the Court jurisdiction over the cause." The High Court of Admiralty might, therefore, according to the supposed effect of this legislation, obtain indirectly a jurisdiction which the general law has directly forbidden, and which the statute has not in any direct way extended by allowing suits commenced in the county court to be removed immediately for trial in the High Court. Another effect of the suggested construction would be that the rights and liabilities of parties entering into the contract of charterparty, and those claiming under them by sale subsequent to the charterparty, would or might be materially altered. It cannot be seriously contended that either of the County Court Acts upon the suggested interpretation would in the absence of distinct enactment impress upon a breach of charterparty a maritime lien. There would be no ground for implying such a lien, because the High Court of Admiralty never had any jurisdiction of any kind with regard to the breach of a contract of charterparty. But it might be, and, indeed, must be, argued that the suggested construction would by reason of s. 3 of 32 & 33 Vict. c. 51 enable the County Court, and, therefore, also the High Court, to realize the damages by seizure before judgment, and by sale of the particular ship. In other words, the damages would, from the moment of arrest, be impressed upon the ship in rem. The difference between this and a maritime lien and the real effect of this are pointed out by Dr. Lushington in the cases of the *Gustaf* (1), and the *Pacific.* (2) Whatever the exact effect be upon the ship by virtue of the reading together of the two Acts, there must be some effect, and consequently the rights and liabilities of shipowners, and the other merchants interested in the mercantile use of ships, must be altered; for at present such damages are realized not by seizing, detaining, and selling the particular ship, but out of the general personal property of the shipowner by seizure and sale in execution after judgment. As affecting commercial business and enterprise the seizure, and detention of a ship are of the utmost gravity; for if she be a general ship the mercantile adventures of many merchants are by such seizure and detention dislocated if not destroyed. The suggested construction would also, as it seems to us, create, as matter of fact, an inequality in the administration of law between different merchants; it would lay a greater burden on the smaller shipowners and merchants using their ships. When the claim would be small, as under 300*l.*, it would generally arise in respect of small

---

(1) Law Rep. 3 A. & E. 314.

---

(1) Lush. Rep. 506; 31 L. J. (P. M & A.) 207.
(2) Bro. & Lush. 243; 33 L. J. (P. M. & A.) 120.

10 Jan As $1110

1872

SIMPSON
v.
BLUES.

cargoes on board small ships, which ships would be impressed with the damages; but in the case of claims in excess of 300*l.*, unless the High Court of Admiralty should successfully assume to remove the cause in the way suggested above, the suit would be tried at the common law, and the ship would not be exposed at a critical moment to detention or delay upon the mere assertion or pretence of a claim, and the ship, upon a claim being established by judgment, would be no more liable to the damages than any other chattel of the shipowner's property. In the one case, that is, in the case of small claims, whether well or ill founded, the navigation of the ship would be hampered both as to the shipowner and as to persons who had contracted for the use of the ship; in the other case, namely, in the case of large claims, the ship would go free. It would also lay a greater burden on charterers of smaller ships. If the larger effect is to be given to the words of the statute, charterers of small ships might be brought into the county court under its Admiralty jurisdiction on claims for charterparty demurrages, or for short freight payable according to charterparty; and if such charterers were to be made liable according to Admiralty procedure the remedy would be against the cargo in rem; if the cargo belonged solely to the charterer this would be a different and more onerous remedy against him than the existing law allows against a charterer of a larger ship; and if the cargo belonged to different shippers, the cargo of one who had made no delay in shipping, or of one who had loaded all he contracted to load might be seized, detained, and sold for a delay in shipping, or short shipment of another shipper over whose acts he could have no control, whereas charterers and shippers of part cargo on board larger ships would incur no such burdens and risks.

These considerations lead, we think, to the conclusion that we ought not so to construe the words of these County Court Acts as to create this large, novel, and inconvenient jurisdiction, when we find from the context that the general intention was only to distribute the existing Admiralty jurisdiction by allowing suits of limited amount to be instituted in inferior courts. As to such courts the rule which has been invariably applied is that there should be no implication to extend the jurisdiction. If ever the rule of construction that "all words, whether they be in deeds,

1CPD172

statutes, or otherwise, if they be general and not express and precise, should be restrained unto the fitness of the matter" was applicable, it would be to limit the alleged erection in an inferior court of a new and unheard of jurisdiction in rem over so many of a class of suits as happened to be within a certain limit of amount in no respect calling for the novel mode of treatment sought to be extracted from the general expressions employed, and at the same time leaving all cases of the same class which are above that limit of amount to be dealt with according to a different law. The correct mode of reading such expressions is to treat them as including, without restriction, the whole of the class of causes in respect of which a like jurisdiction had previously been exercised, and to restrain them in construction to causes of that class. The authorities upon the construction of these and analogous Acts illustrate the propriety of this rule of construction. In the case of *The St. Cloud*, (1), Dr. Lushington had to consider what was the true rule of construction to be applied to s. 6 of "The Admiralty Court Act, 1861" (24 Vict. c. 10), which enacts that "the High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods, &c." It was contended that those words ought to be construed in their largest sense, and therefore gave jurisdiction in the case of a claim by any and every assignee of a bill of lading; but the learned judge held that the words must be limited in construction so as to include only an assignee to whom the property in the goods passed by the contract and assignment. "Primâ facie," he says, "the words of the 6th section would give every assignee, whether for value or not, a right to sue in this court, &c." "What is the true construction, however," he afterwards says, "of the words 'any claim'? I think that the true construction of the words 'any claim,' is any claim lawfully existing independently of this Act. It may be said, I think, with some force that if it was intended to create a new right of action, the legislature would have expressed such intention in clearer and more intelligible terms." It is true that in *The Nepoter* (2) the present learned judge of the Admiralty Court has entertained an opinion that the construction put upon the statute in the case of

---

(1) Bro. & Lush. 4.

(2) Law Rep. 2 A. & E. 375.

The St. Cloud (1) cannot be supported; but as he held in the case before him that the property did pass, his intimation as to the construction of the statute was not necessary for the decision of the case. In the case of *The Dowse* (2) a suit was instituted in the county court against a British ship and owners for necessaries to an amount less than 150*l.* supplied to the ship, it appearing that a part owner was domiciled in England. Under such circumstances the High Court of Admiralty had no original jurisdiction either under 3 & 4 Vict. c. 65, or under 24 Vict. c. 10. But it was contended that the county court nevertheless had jurisdiction by virtue of the large words in s. 3 of 31 & 32 Vict. c. 71, which are: "That any county court, &c., shall have jurisdiction, &c., to try and determine, &c., as to any claim for necessaries in which the amount claimed does not exceed 150*l.*" But it was held, on appeal, by the judge of the High Court of Admiralty, that the construction must be so limited as to give to the county court jurisdiction only in cases where the High Court of Admiralty would also have jurisdiction.

In the case of *The Ruby*, brought before Willes, J., at chambers, the suit was instituted by the shipowner for demurrage alleged to be due according to charterparty, and was commenced by plaint in the county court. The jurisdiction was claimed under s. 2 of 32 & 33 Vict. c. 51, as in the present case. But the learned judge granted a writ of prohibition, on the ground that the words not being clear, though large, ought not to be construed so as to give a new right to the shipowner as against cargo, and to impose a new liability on cargo. In *Everard* v. *Kendall* (3) the question came before the Court, whether, by virtue of 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, the county court had jurisdiction to entertain and determine as in an Admiralty suit a claim by the owner of a barge impelled by oars only in respect of a collision in the Thames with another such barge. It is true that the case is not a direct authority with regard to that now before the Court, because the question there turned rather upon the construction of the word "ship" as interpreted by general orders than on the construction to be put upon the statute where the alleged enactment is not

(1) Bro. & Lush. 4.

(2) Law Rep. 3 A. & E. 135.

(3) Law Rep. 5 C. P. 428.

direct and clear, but indirect and doubtful. But the argument and the judgments delivered treated much of the effect of the large words used in some sections of the County Court Acts, and on the effect of them, if interpreted in their largest sense, upon the jurisdiction of the High Court of Admiralty, and the rights and liabilities of parties, and on the effect on them of the sections giving to the High Court of Admiralty the powers of appeal and transfer. The judges who took part in that case were of opinion that the large words used in the two County Court Acts were, upon a true interpretation, to be held to apply only to such subject-matters of suit as were, before the passing of those Acts, within the jurisdiction of the High Court of Admiralty. We are of that opinion now. The County Court Acts, we think, invest certain county courts with a jurisdiction to entertain and determine a certain limited portion of the cases which were formerly entertained and determined only in the High Court of Admiralty; but those Acts do not, we think, by inference and indirect enactment, enlarge the jurisdiction of the High Court of Admiralty, or by giving to the county courts a method of procedure not before used either in the Admiralty Court or at the common law, alter the rights and liabilities of merchants engaged in maritime adventure. They give, as indeed they propose in terms to give, a part of the Admiralty jurisdiction to be administered in a modified form; they do not give as Admiralty jurisdiction a jurisdiction which the Court of Admiralty never possessed. The case of *The Swan* (1) does not induce us to modify this view. In that case it was assumed, without argument, that the county court had jurisdiction in a case of demurrage; and, we think, assumed without argument that an indirect jurisdiction was given to the High Court of Admiralty; and the only point decided was that if both those assumptions were true, the High Court of Admiralty ought to transfer the cause. Again, the case of *The Sylph* (2) affirmed on appeal by the Privy Council in *The Beta* (3), in which it was held that a claim for compensation for personal injuries caused by negligent management of a ship might be maintained by a suit in rem in the Admiralty Court against

(1) Law Rep. 3 A. & E. 314.

(2) Law Rep. 2 A. & E. 24.

(3) Law Rep. 2 P. C. 447.

1872

SIMPSON
v.
BLUES.

the ship by virtue of the words, "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship," which are contained in s. 7 of 24 Vict. c. 10, and the case of *The Guldfaxe* (1), would be, if unimpeached, authorities to a great extent against the conclusion at which we in this case arrive. But these cases have been seriously impeached by the case of *Smith* v. *Brown* (2) in the decision and reasoning and observations of which we entirely concur. We are, therefore, of opinion that the county court had no jurisdiction in the present case to entertain the suit or to detain the ship, and that a writ of prohibition ought to issue.

Rule absolute for a prohibition.

Attorneys for plaintiffs: *Gregory, Rowcliffe, & Rawle.*

Attorneys for defendants: *Mercer & Mercer, for Oliver & Botterill.*

May 7.

REVELL *v.* BLAKE.

Bankruptcy—Jurisdiction of County Court—Adjudication—Copy of Gazette, of what conclusive—Execution against Goods of Bankrupt Trader—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 10, 59, 71, 72, 80 & 87.

15 Q 222-3
(73) 81
8 C P 533
Ch D. 797.

A petition for adjudication of bankruptcy was presented to a county court, describing the party against whom it was presented as a gentleman, and stating that he resided within the district of the county court, and did not reside or carry on business within the district of the London Bankruptcy Court, and that the act of bankruptcy was failure to pay, secure, or compound for a debt within three weeks of the service of a debtor's summons. The petition was accompanied by the usual affidavit verifying the statements therein required by the bankruptcy rules. Upon such petition the county court adjudicated the debtor a bankrupt in the usual form. The bankrupt did, in fact, carry on business as a wine merchant, under a name other than his own, in the city of London, but the fact of his so carrying on business was not brought to the attention of the county court judge at the time of the adjudication, nor was the fact of the bankrupt being a trader referred to either in the petition or the order of adjudication. The trustee appointed under the bankruptcy claimed the proceeds of an execution as against an execution creditor of the bankrupt, under the 87th section of the Bankruptcy Act, 1869, which applies only to the case of a bankrupt trader. At the trial of an interpleader issue to determine the right to the proceeds of the execution, at which the above facts were proved, and a copy of the *Gazette* containing the order of adjudication was put in, it was contended by the execution creditor that the adjudication of bankruptcy was a nullity, having been made by the county court without jurisdiction, inasmuch as the bankrupt in fact carried on business within the district of the London court; and, secondly, that if the order of adjudication was conclusive of the validity of the adjudication, it having been made against the bankrupt as a non-trader, the trustee was concluded by it from shewing that the bankrupt was in fact a trader.

---

(1) Law Rep. 2 A. & E. 325.

(2) Law Rep. 6 Q. B. 729.

Held (by Bovill, C.J., Byles and Grove, JJ.; dissentiente, Brett, J.), that the county court judge having decided as to the existence of the facts upon which his jurisdiction depended upon evidence before him of such facts, such decision was conclusive; and, consequently, by virtue of the 10th section of the Bankruptcy Act, 1869, a copy of the *Gazette* containing the order of adjudication was conclusive against the execution creditor, on the interpleader proceedings, of the validity of the adjudication. And, secondly, that the copy of the *Gazette* not being made conclusive by the 10th section except for the purposes of the adjudication, and there being nothing in the Act, at any rate where the act of bankruptcy was one common to traders and non-traders, as in the present case, requiring that the adjudication should be made against the bankrupt in the character of a trader or non-trader, the trustee was not concluded from shewing that the bankrupt was in fact a trader.

Per Brett, J., that, inasmuch as the validity of the adjudication, upon which the trustee's title depended, involved the assumption that the bankrupt did not carry on business in the district of the London Court of Bankruptcy, the trustee could not be allowed to allege that the bankrupt did so carry on business.

Affirmed in Ex Ch LR 8 CP. 533.

INTERPLEADER issue in which the plaintiff, as the trustee of the estate and effects of one Maxwell, a bankrupt, affirmed, and the defendant denied, that a certain sum of money, being the amount realized under an execution by the Sheriff of Surrey under a writ of fi. fa. issued at the suit of the defendant against the bankrupt, and paid into court under a judge's order, was at the time of such order the property of the plaintiff as against the defendant.

The trial took place before Byles, J., at Guildhall, at the sittings after Michaelmas Term, when the facts appeared to be as follows:—

The judgment upon which the execution issued was signed on the 17th of August, 1871. On the 20th of August execution was levied, and on the 24th the goods were sold under the execution. On the 25th of August notice was served on the sheriff's officer that Maxwell had committed an act of bankruptcy, and that a petition in bankruptcy would be presented against him on behalf of Messrs. Cocks, Biddulph & Co. On the 29th of August a petition was accordingly presented in the county court of Kent, holden at Greenwich, and on the 30th of August the sheriff's officer was served with notice, on behalf of the petitioning creditors, that a petition had been presented on the previous day. Neither of these notices, nor the petition, in any way referred to the bankrupt's being a trader, but he was, in fact, the owner of a business called the "Telegraph Wine Shades," carried on at 4, Little Bell Alley, Moorgate Street, and 2, Telegraph Street Chambers, in the name of C. L. Humby & Co.

On the 6th of September, 1871, a further notice was served on behalf of the creditors, on the sheriff, stating that a petition had been presented against Maxwell in the county court at Greenwich, on the 29th of August, which petition was appointed to be heard on the 27th of September; that Maxwell had committed an act of bankruptcy and that he was a trader, and requiring the sheriff not to part with the proceeds of the execution.

On the 18th of October Maxwell, who did not appear, was adjudicated a bankrupt on the petition so presented on the 29th of August, and on the 7th of November plaintiff was appointed the trustee under the bankruptcy.

At the trial the plaintiff's counsel put in a copy of the *Gazette* containing the order of adjudication, and, to bring the case within the 87th section of the Bankruptcy Act, 1869, which applies only to bankrupt traders, tendered evidence to prove that the bankrupt carried on business as above mentioned. The petition and other bankruptcy proceedings were tendered by defendant's counsel and received in evidence; subject, however, to objection on the part of the plaintiff as to their admissibility. The petition and adjudication followed the form given by the General Rules made under the Bankruptcy Act, 1869. The petition described the bankrupt as a gentleman, and stated that he did not reside or carry on business within the district of the London Bankruptcy Court, but resided within the district of the county court; that is to say, at the Glen, Kirkdale, Sydenham, in the county of Kent. It then stated a sufficient petitioning creditor's debt, and that the act of bankruptcy committed by the bankrupt was that he was on the 3rd of August served with a debtor's summons for a sum of 607*l.* 7*s.* 11*d.*, and for the space of three weeks succeeding such service neglected to pay the said sum or secure or compound for the same. The petition was accompanied by affidavits verifying the statements contained therein as required by the bankruptcy rules.

The adjudication was as follows:—

"In the county court of Kent, holden at Greenwich. In the matter of a bankruptcy petition against Arthur Magennis Maxwell, of the Glen, Kirkdale, Sydenham, in the county of Kent, gentleman. Upon the hearing of this petition this day, and upon proof satisfactory to the Court of the debt of the petitioner, and of the act or acts of bankruptcy alleged to have been committed by the said Arthur Magennis Maxwell having been given, it is ordered that the said Arthur Magennis Maxwell be, and he is hereby adjudged bankrupt."

It appeared from the bankruptcy proceedings that before adjudication an application had been made to the county court of Greenwich for the appointment of a manager of the bankrupt's business as a wine merchant, supported by affidavits, which shewed that the bankrupt carried on such business in the city of London as before mentioned. There was some discussion on the argument as to whether certain of the bankruptcy proceedings were put in at the trial, but the judgment, as will be seen, appears to treat the case on the footing that all the bankruptcy proceedings were to be taken as in evidence.

On the above facts the defendant's counsel contended that the adjudication being against the bankrupt as a non-trader, the plaintiff could not now rely on the fact of his being a trader, and that the evidence of trading was not admissible, but if admissible, shewed that the county court at Greenwich had no jurisdiction to make the adjudication, inasmuch as by s. 59 of the Bankruptcy Act, 1869, where the person sought to be made a bankrupt resides or carries on business in the district of the London Bankruptcy Court, the London Court can alone adjudicate. The verdict was entered for the plaintiff, leave being reserved to the defendant to move to enter it for himself, on the ground that the county court had no jurisdiction to adjudicate Maxwell a bankrupt, and that the bankrupt being adjudicated as a non-trader and plaintiff appointed trustee under such adjudication, the plaintiff was estopped from asserting that the bankrupt was in fact a trader.

A rule nisi having been obtained accordingly,

May 1, 6, 7. *W. G. Harrison,* and *R. Vaughan Williams,* shewed cause.

This Court is precluded from inquiring into the question of jurisdiction. The intention of the statute was to create a court of high authority and general jurisdiction for the purpose of deciding all matters relating to bankruptcy finally between the parties, and to prevent the validity of the bankruptcy proceedings being investigated in any subsequent proceedings. By the 10th section of the Act the order of adjudication is made conclusive of the validity of the adjudication. The language of that section is very different from that of previous Acts relating to the same subject, e.g., 12 & 13 Vict. c. 106, s. 233. It is clear from the 8th and 9th sections that the intention is that the Court of Bankruptcy shall be the court to examine into the existence of the necessary preliminaries to bankruptcy, and that its decision shall be final. That decision is in the nature of a judgment in rem, which creates the status of bankruptcy. No evil can arise from this, for abundant provision is made for appeal against a decision of the local tribunal by the 71st section. The decisions with regard to prohibitions are strong to shew that when the ultimate court of appeal from the statutory court is the House of Lords, the statutory court may be the only tribunal to decide as to its jurisdiction: *Forster* v. *Forster.* (1) The principle on which it was always held that the Common Law Courts had a right to determine the question of jurisdiction and to prohibit was based on the danger of a different decision of the same rights and even of the same identical interests in different courts. This danger is obviated where there is an appeal to the House of Lords. The omission of all provision similar to that of the 12 & 13 Vict. c. 106, s. 234 from the present Act shews clearly what the intention was.

[BRETT, J. But supposing the adjudication of bankruptcy to have been by a Court having no jurisdiction, do the provisions of s. 10 apply at all?]

The 10th section concludes all inquiry as to jurisdiction. Moreover, it is clear law that where the jurisdiction depends on a question of fact involved in the inquiry which it is the duty of any Court to make, the Court exercising such jurisdiction must have power to decide on that fact on the evidence before it, and if it has bonâ fide investigated as to the existence of that fact its decision cannot afterwards be questioned: *Reg* v. *Bolton.* (1) There was no evidence before the county court of the trading in London. That Court did not wrongfully assume jurisdiction in the teeth of the facts; it exercised a jurisdiction which, on the facts before it, it was bound to exercise. Moreover, the county court had in any case jurisdiction. The provisions of s. 59 are only directory, or, at any rate, the question whether the proceedings are carried on in the right district, is merely matter of procedure. The carrying on of the proceedings in the wrong court is merely an irregularity which would be set right on appeal. By the 6th sub-section of the 80th section "every Court having original jurisdiction in bankruptcy shall be deemed to be the same Court, and to have jurisdiction throughout England." The inconvenience of having the proceedings made void after any length of time by reason of the discovery of a fact which it might be impossible to discover at the time would be very great.

---

(1) 4 B. & S. 187; 32 L. J. (Q.B.) 312.

[BRETT, J. Your contention on this section amounts to saying that a county court in Northumberland could adjudicate a man bankrupt who carried on business or resided in Warwickshire with knowledge of the fact.]

The proceedings would, in such a case, be immediately set aside on appeal.

[BRETT, J. Is jurisdiction properly a subject of appeal?]

That assumes that this is a question of jurisdiction. Secondly, the adjudication is not conclusive as to the bankrupt being a non-trader. It simply adjudges the party to be a bankrupt. There is nothing in the Act, or in the Bankruptcy Rules, or the forms given by them, that provides for an adjudication against the bankrupt in the character of a trader or a non-trader. No doubt different consequences follow on adjudication according as the bankrupt is a trader or not, but these consequences depend on the fact of his being a trader or not, not on the adjudication. The order of adjudication is only made conclusive by s. 10 as to any fact for the

---

(1) 1 Q. B. 66.

1872

REVELL v. BLAKE.

purposes of the adjudication, not as to such fact when it comes in question for any other purpose, e.g., for the purposes of the 87th section. In the present case the adjudication of bankruptcy did not involve any adjudication on the question whether the bankrupt was a trader or not, inasmuch as the Act of Bankruptcy relied on was one which was common both to traders and non-traders. The forms of petition and adjudication, forms 10 and 26, only provide for any mention of trading when it is material for the purpose of adjudication, i.e., when the act of bankruptcy is one peculiar to traders. Accordingly in this case the petition and adjudication do not refer to the trading or non-trading, the word gentleman being merely descriptive.

[BRETT, J. It seems to me that the plaintiff is seeking for one purpose to say that the bankrupt was not a trader in London, and for another to prove that he was.]

The consequences would be very serious if the adjudication was held conclusive as to the bankrupt being a non-trader, for the reputed ownership clauses and many of the clauses creating criminal offences only apply to traders.

[They cited *Edwards* v. *Gabriel* (1); *Home* v. *Lord Camden* (2); *Gould* v. *Capper* (3); *Burder* v. *Veley* (4); *White* v. *Steele* (5); *Brymer* v. *Atkins* (6); *Thompson* v. *Ingham* (7); *Robinson* v. *Lenaghan* (8); *Gardner* v. *Booth* (9); *Ex parte Anderson.* (10)]

Powell, Q.C., *Morgan Howard*, and *R. F. Stone*, supported the rule. The 10th section of the Bankruptcy Act only applies to cases where there has been an adjudication by a Court having competent jurisdiction. It dispenses in such a case with the necessity for proof of the preliminaries essential to the validity of the adjudication. The county court of Greenwich had no jurisdiction to adjudicate Maxwell a bankrupt, inasmuch as he carried on business in the district of the London court. The fact that he did so carry on business appeared upon the bankruptcy proceedings before the adjudication,

Jur. N.S. 634.

(1) 7 H.& N.520; 31 L.J.(Ex.)113.

(2) 2 H. Bl. 533.

(3) 5 East, 345.

(4) 12 A. & E. 233.

(5) 12 C. B. (N.S.) 383; 31 L. J. (C.P.) 265.

(6) 1 H. Bl. 165.

(7) 14 Q. B. 710; 19 L. J. (Q.B.) 189.

(8) 2 Ex. 333; 17 L. J. (Ex.) 174.

(9) 2 Salk. 549.

(10) Law Rep. 5 Ch. App. 473.

inasmuch as it was made the foundation for an application for the appointment of a manager of the business. It is quite clear that the provisions of the 59th section of the Act upon which the jurisdiction of the county courts depend, give only a limited jurisdiction with relation to the locality in which the bankrupt resides or carries on business. The provision of the 6th sub-section of the 80th section is expressly declared to be "subject to the provisions of the Act." It does not enlarge the jurisdiction of the county courts, but merely deals with the case of a transfer of the proceedings. The plaintiff's own case is that the bankrupt was a trader in London. In setting up that fact he shews that the adjudication was in fact made by a court which had no jurisdiction. As to the second point, if the adjudication is conclusive for the purposes of jurisdiction it is also conclusive, having been made against the bankrupt as a non-trader, that he is not a trader. The adjudication follows the petition. The petition is clearly against the debtor as a non-trader. He is described as a gentleman, and the act of bankruptcy is one applicable to a non-trader.

[BOVILL, C.J. The adjudication may be conclusive for a particular purpose and as between certain parties, but not conclusive for another purpose and between other parties. The section does not say that it shall be conclusive of all matters stated in the petition, but only conclusive as to adjudication.]

In the 233rd section of the 12 & 13 Vict. c. 106, the adjudication is to be conclusive in all proceedings "against the bankrupt." Here there is no such limitation. It is necessary for the purposes of the Act that the adjudication should be against the bankrupt as a trader or a non-trader. The forms of petition and adjudication given by the rules both direct that mention shall be made of the trading, if necessary. Here they did not refer to the trading. The adjudication was clearly, therefore, against the bankrupt as a non-trader. That being so, the adjudication is conclusive as to the character in which the bankrupt was made bankrupt for all purposes. *Reg.* v. *Levi* (1) is in point. By the 10th section the order is conclusive that he was "duly" adjudicated bankrupt. It is, therefore, conclusive that he was rightly adjudicated bankrupt as a non-trader.

(1) Leigh & Cave C. C. 597; 34 L. J. (M.C.) 174.

[They cited *Elston* v. *Rose* (1); *Brown* v. *Cocking* (2); *Ex parte Vaughan* (3); *Attorney-General* v. *Lord Hotham.* (4)]

Bovill, C.J. This case is one of considerable difficulty, and it is not altogether easy to reconcile all the language of the various sections of the Bankruptcy Act with any view of it. Still our attention has been so fully drawn to the provisions of the Act, especially by Mr. Williams, that we do not think it necessary to take time to consider the case. There is a clear intention pervading the whole of the Act that the Court of Bankruptcy shall be a court of record of very high authority. The chief judge is to have all the powers, jurisdiction, and privileges possessed by any judge of the Common Law Courts, or of the Court of Chancery. So also the judge of every local court having bankruptcy jurisdiction is to have very extended powers, and there may be a series of appeals from the local court to the chief judge, and from him to the Court of Appeal in Chancery, and thence to the House of Lords. It is also intended that the decision of the Court of Bankruptcy shall be conclusive on matters within its competency. The various provisions relating to these matters are to be found in ss. 65–72, and s. 82. By the 10th section a copy of the *Gazette* containing an order of the court, adjudging the debtor to be bankrupt, shall be conclusive evidence of the debtor having been adjudged a bankrupt, and of the date of the adjudication. In like manner a copy of the *Gazette* is made conclusive evidence of the annulling of a bankruptcy by s. 81. These sections are very different, it will be observed, in their effect from ss. 233–242 of the Bankrupt Law Consolidation Act, 1849. The jurisdiction of the several local courts in bankruptcy is governed by s. 59. This section is to be found under the heading, "Constitution and Powers of Court" and "Description of Court." I do not think its requirements can be considered merely as directory, as suggested by Mr. Williams. The question therefore arises, whether the county court, in this case, had jurisdiction to adjudge Maxwell a bankrupt. A petition was duly presented by creditors on the 29th of August, in which the debtor was described as of the Glen, Kirkdale, Sydenham, in the county of Kent, which would be within the jurisdiction of the Greenwich County Court. He is further described as a gentleman, and it is stated that he does not reside or carry on business within the district of the London Bankruptcy Court. The petition then states a sufficient petitioning creditor's debt and an act of bankruptcy committed by the debtor, viz., the non-payment of the petitioning creditors' debt within three weeks of the debtor's summons. The petition does not state that the debtor was a trader. It is true that in form No. 10, appended to the rules made under s. 78, it is said in the note, "where necessary add an allegation that the debtor is a trader." There is a distinction in the Act, no doubt for certain purposes, between a trader and a non-trader, especially with respect to certain acts of bankruptcy under the 3rd, 5th, and 6th subss. of s. 6. So also with regard to reputed ownership under s. 15, subs. 5; with regard to proceeds of executions, s. 87, fraudulent preference, s. 95, and voluntary settlements, s. 91, as well as other matters. But the petition in this case alleged an act of bankruptcy which was equally applicable to the case of a trader or a non-trader, viz., non-payment of a debt within twenty-one days of a debtor's summons, which, as it included non-payment within seven days of the summons, was an act of bankruptcy, whether committed by a a trader or a non-trader. The jurisdiction of the Court would not in such a case be affected by the mere fact of the debtor's being a trader or a non-trader. In such a case it seems not to be necessary to state in the petition whether the debtor is a trader or not; in either case he would be equally liable to be made a bankrupt on the statements made in the petition. On such a petition being presented to the county court at Greenwich, it seems to me that the Court had jurisdiction to entertain it, and would be bound to do so; it would have authority to inquire into the allegations contained in the petition. By s. 80, rule 29, and the forms 11 and 12, the petition must be verified by affidavit. If the debtor intends to dispute any of the matters alleged in the petition, he must give notice to the registrar and the petitioner of the grounds on which he disputes the same; and if he fail to do so, and does not appear, the Court may adjudicate the debtor bankrupt without further proof: see rules 36 to 38. From the statements made to us by counsel it would appear that the adjudication was made by the

---

(1) Law Rep. 4 Q. B. 4.

(2) Law Rep. 3 Q. B. 672.

(3) Law Rep. 2 Q. B. 114.

(4) 1 Turn. & Russ. 209.

1872

REVELL
v.
BLAKE.

Aff 15 Eq 223

registrar in pursuance of these rules. If the case comes on for hearing, by s. 8 the Court is to require proof of the petitioning creditors' debt, the trading, if necessary, and of the act of bankruptcy; and, if satisfied with such proof, shall adjudge the debtor to be bankrupt. Here there was an affidavit verifying all the allegations in the petition, which would therefore include the statement as to the debtor's not carrying on business within the district of the London Court. This affidavit was before the court at Greenwich, and it would be competent to the judge, and his duty, to inquire into and determine the case with respect to the truth of the allegations in the petition, if disputed, and on the evidence which might be given as to the locality of the residence or the trading. From his decision on that point there might be a series of appeals, as provided by s. 71. If the contention of the defendant could be maintained then a party might, after the failure of a series of appeals, and after any lapse of time, contest the question of the jurisdiction of the Court in any action in which the validity of the adjudication might be material. This seems to me precisely what the Act was intended to prevent. The consequences of allowing all the bankruptcy proceedings to be avoided after any lapse of time, in some collateral proceeding, by reason of an alleged want of jurisdiction, are so serious that we ought not to adopt a construction of the Act which would produce this result, if any other reasonable construction can be suggested. In this case there being the usual affidavit of verification, the county court had primâ facie jurisdiction, and was bound to enter on the case. There being no notice to dispute any of the allegations in the petition, and the debtor not appearing, the registrar proceeded to adjudicate the bankrupt in the usual way without further inquiry. The order of adjudication was published in the *Gazette*, and advertised in the usual way. There was no appeal against the adjudication, and a copy of the *Gazette* was produced and put in evidence at the trial. The 10th section of the Act is now relied on by the plaintiff, which enacts that the *Gazette* shall be conclusive evidence of the debtor's having been duly adjudged a bankrupt. In ordinary cases where the jurisdiction of an inferior tribunal, as of magistrates at petty sessions, depends on some fact into which it is their duty to inquire as essential to their jurisdiction, the determination of that tribunal after bonâ fide investigation as to such fact is conclusive as to the existence of jurisdiction, so far as that fact is concerned: see *Reg.* v. *Bolton* (1); *Mould* v. *Williams.* (2) In this case the residence of the debtor within the district of the Greenwich County Court, and his not residing or carrying on business within the district of the London Court, seem necessarily to be matters into which the county court was bound to inquire as essential to jurisdiction. The registrar must be taken to have decided on the affidavit that the allegations in the petition were proved, and to have determined on the evidence before him the matter of fact on which the jurisdiction depended. At a late stage of the argument it was stated that before the adjudication was made an affidavit had been made for the purpose of procuring the appointment of a manager of the business of the debtor, shewing that such business was carried on in London. It does not appear that the attention of the judge was called to this on the question of jurisdiction. Still, even if it had been, and the Court, notwithstanding, came to the conclusion, the affidavits being contradictory, that the debtor did not in fact carry on business in London, I do not think the judgment of the county court on the evidence as to the matter of fact could be questioned in this action.

It was contended by the plaintiff's counsel that under s. 80, subs. 6, every county court had original jurisdiction conferred on it throughout England. It is to be observed, however, that s. 80 is to be found under the heading "Supplemental Provisions" and "As to Proceedings." It is one of a series of regulations which the Act says shall be made with respect to the proceedings in bankruptcy. Several of these subsections relate to the transfer of proceedings from one court to another. It seems to me that the expressions in subs. 6 have reference to the rest of the enactment in the section, and without saying they are to be confined to the mere transfer of cases, I think the general object of them must be limited in some such way. The subsection commences with the words, "subject to the provisions of this Act." It cannot be that it is intended to have the extraordinary and sweeping effect which is suggested when such an effect would be quite at variance with the provisions of

---

(1) 1 Q. B. 66.

(2) 5 Q. B. 469.

s. 59. I think, therefore, that looking to the mode in which ss. 80 and 59 are respectively introduced into the Act, the 59th section governs the question of jurisdiction, and the 6th subsection of s. 80 cannot have the effect attributed to it by the counsel for the plaintiff. I am, however, of opinion on the general rules of law applicable to the subject, and on the 10th section of the Act, that the adjudication of the county court was conclusive as to the validity of the proceedings, and the question of jurisdiction so far as it depends on the fact of the bankrupt's not carrying on business in London, and that that fact cannot now be inquired into.

But then it was contended that, if the adjudication was to be taken as conclusive as to that fact for the purposes of jurisdiction, it must be taken as conclusive for other purposes, and that, as plaintiff could not succeed unless he could shew that the bankrupt was a trader, and was estopped from doing this by the adjudication, the defendant was entitled to the verdict. The question was much argued whether it was necessary that the adjudication should state that the bankrupt was a trader. I can find nothing in the Act that provides for the adjudication being in a different form as against a trader and a non-trader. It could never have been intended that the adjudication should be rendered invalid because the bankrupt was or was not a trader. The form of the order is quite general, and it is declared to be conclusive as to adjudication. The point to be decided by the Bankruptcy Court on the petition is whether the debtor is bankrupt or not. It is not called on to decide whether he is a trader or not unless that fact is material with reference to the allegations in the petition. If it were necessary for the purposes of the petition to inquire into the question of trading it would be inquired into. So far as the effect of adjudication is concerned it is not necessary to decide that fact. When the debtor is adjudicated bankrupt, and the trustee is appointed, the effect is to pass all the property of the bankrupt to the trustee whether the debtor was a trader or not. The forms of proceedings, 28 to 41, make no distinction in point of form between the bankruptcy of a trader and a non-trader; as, for instance, the notice of appointment of the trustee by advertisement in the *Gazette*. It is quite true that under s. 87 of the Act which authorizes the trustee to claim from the sheriff the proceeds of goods taken in execution on notice of the petition, such right is only given in cases where the bankrupt was a trader, and if the Act had made it necessary to adjudicate the debtor bankrupt as a trader or a non-trader, and the debtor here had been adjudicated as a non-trader, the defendant's counsel would have had strong grounds for his argument. It seems to me, however, on looking to the words of the Act and the distinctions that occur between traders and non-traders, it is not necessary, under the Act, to determine in the adjudication whether the bankrupt is bankrupt as a trader or non-trader. The form of adjudication given in the forms under the Act and that used in the present case, which is in general terms, are in complete accordance with the 8th section, which merely says that the court shall adjudge the debtor a bankrupt. With regard to the effects of adjudication when once made under the Act it seems to be unnecessary that there should be in the petition or adjudication any reference to the fact of the bankrupt's being a a trader or not.

Suppose the debtor had a petition presented against him in a form similar to that in the present case, describing him as a gentleman, not stating him to be a trader, and alleging an act of bankruptcy common both to traders and non-traders. Suppose the order of adjudication to be made on such a petition, and that afterwards it is discovered that the bankrupt secretly carried on business not in the London district, but in that of some other county court, could it be said that on the true construction of the Act the proceedings were all invalid, because the debtor was not expressly adjudged a bankrupt as a trader? Again, if the proceedings stated expressly that the debtor was a trader, could it be contended that they would be invalid if he were not in fact a trader, as alleged? The fact that the bankrupt was in the present case a trader is admitted. But it is contended, for the reasons before stated, that the plaintiff is prevented from relying on the fact. It seems to me that in this action, as between these parties, the question arising whether for the purposes of the 87th section the bankrupt is a trader, there is nothing in the general law or the provisions of the 10th section which prevents the plaintiff from shewing what is the real fact. It is to be observed that in such cases there is no affirmation or negation by the London or county court of the fact

1872

REVELL v. BLAKE.

of trading in general, but only an inquiry in those courts whether the debtor did or did not reside or carry on business in a particular locality mentioned in the petition. Though the bankrupt in fact carried on business in London it must be taken that the contrary was proved to the satisfaction of the county court judge on the evidence laid before him before adjudication. So far as the adjudication is concerned, and for the purposes of jurisdiction, the decision of the county court is conclusive; but for other purposes, and as between other persons, the plaintiff is not precluded from shewing the real fact.

It appears to me, for these reasons, that the plaintiff is entitled to retain his verdict, and this rule should be discharged.

BYLES, J. I am of the same opinion. It seems to me almost unnecessary that I should add anything to the very full and elaborate judgment of my Lord, in which I concur. It was argued that the county court had no jurisdiction to adjudge Maxwell a bankrupt. I think it has been sufficiently shewn by reference to the sections of the Bankruptcy Act, 1869, that this objection cannot now be sustained. It was then contended that the adjudication was against the bankrupt as a non-trader; the only foundation for that seems to be the description of him as a "gentleman." I do not think that that description amounts to an adjudication that he is not a trader.

One great object of the recent Bankruptcy Act was to supersede the old expensive inquiries at nisi prius as to petitioning creditor's debt, trading, and act of bankruptcy, by making the order of adjudication conclusive evidence of those essentials; and we ought, if possible, so to construe the Act as to accomplish that object.

BRETT, J. I should have desired to consider this case further if the other members of the Court did not entertain so clear an opinion on the matter; but as they do, I do not think it necessary to postpone the judgment. The question is, whether the plaintiff, the alleged trustee in bankruptcy of the estate of one Maxwell, or the defendant, an execution-creditor, is entitled to the proceeds of the execution. The facts are these: the execution was levied and the goods were sold by the sheriff on the 24th of August. On the

29th of August a petition in bankruptcy was presented against Maxwell in the county court at Greenwich. On the 6th of September a valid notice of that petition was given to the sheriff. On the 18th of October the Greenwich County Court adjudicated Maxwell bankrupt. The defendant being an execution-creditor, and the goods having been seized and sold before the adjudication, the defendant is by the common law entitled to the proceeds of the execution unless his right is ousted by the 87th section of the Bankruptcy Act, 1869. To bring the case within s. 87, the plaintiff was bound to prove that Maxwell was a trader and was duly adjudicated bankrupt. I apprehend that though the word "duly" is not found in s. 87, still the trustee is bound to prove that Maxwell was adjudicated bankrupt by a Court which had jurisdiction. On the trial of the interpleader it appeared that Maxwell, at the time of adjudication, was, in fact, a trader in London, but had been adjudicated a bankrupt as a non-trader in the Greenwich County Court. It was contended on the part of the plaintiff that the county court of Greenwich had nevertheless jurisdiction to adjudge Maxwell a bankrupt, and that if it had not such jurisdiction, yet the defendant could not inquire into the matter but was concluded by the publication in the *Gazette* under the 10th section as to the fact that Maxwell had been adjudicated bankrupt by a Court of competent jurisdiction. It was further contended that the plaintiff had a right to shew that Maxwell was a trader in London, and consequently that the plaintiff had sustained the burthen of proof which lay upon him by shewing that Maxwell was duly adjudicated bankrupt, and that he was a trader, and that therefore the defendant's rights as execution-creditor were ousted. The defendant contended, first, that the Greenwich County Court had acted without jurisdiction, and, secondly, that if the defendant was concluded from alleging that there was no jurisdiction, then the plaintiff was concluded from alleging that Maxwell was a trader in London. It was argued by the plaintiff's counsel that the county court of Greenwich had jurisdiction; that there was only one Court of Bankruptcy in England, and all the county courts were part of the superior Court of Bankruptcy, and had therefore universal jurisdiction. It was admitted that the adjudication by the county court as to a person not residing or carrying on business within its limits, or doing so within the London district, was not regular, but still it was urged that the county court had jurisdiction. The question whether this is so, depends on the 59th and 72nd sections, and the 6th sub-section of the 80th section of the Bankruptcy Act, 1869. It appears to me that the jurisdiction of the county courts depends wholly on s. 59; and that but for this section they would have none. The jurisdiction which it confers on them is limited with reference to the persons on whom it may be exercised, and depends on the fact of such persons residing or carrying on business within the district of the court, and not within the London district. It does not seem to me that s. 72 has the effect of conferring on these Courts an unlimited jurisdiction. Its provisions are to be read subject to the other provisions of the Act. The same considerations apply to the 6th sub-section of s. 80. It gives jurisdiction only in case of a transfer of proceedings from one court to another. In such case, the foundation of the jurisdiction is the transfer. If, then, except with regard to cases of transfer, we must look to the 59th section alone as giving the county court jurisdiction, and that section limits its jurisdiction to persons not residing, or carrying on business within the London bankruptcy district, it follows that in truth in the present case the county court had no jurisdiction. It is argued, however, that by s. 10 the defendant and this Court are concluded from saying that Maxwell was not duly adjudicated bankrupt. I agree that the adjudication is by the express terms of the Act only conclusive as to the question whether the alleged bankrupt has been properly adjudged bankrupt; but then the adjudication must be assumed to be made by a Court of competent jurisdiction. Now the county court is an inferior court, and in order that s. 10 may have effect, this Court and the defendant must be concluded from denying that the county court had jurisdiction to adjudicate Maxwell a bankrupt, and they can only be so concluded on the assumption that the county court judge must be taken to have decided the negative fact alleged in the petition, that Maxwell was not a trader in the London district. I think if an inferior Court has no jurisdiction to decide except on the assumption that a certain condition of things existed, whether that involves a positive or negative proposition, and if the decision of the Court is put forward as conclusive, it must also be accepted as conclusive that the condition of things existed that was necessary to give jurisdiction, and he who puts the decision forward as conclusive must also take the preliminary facts to be conclusively proved. He must contend that there was jurisdiction, and therefore that the conditions existed to give jurisdiction; that is, in this case, the plaintiff when he puts forward the adjudication by the county court at Greenwich as conclusive, must likewise, it appears to me, accept as conclusive the fact that the bankrupt did not carry on business in the London district. It is true that the defendant in this case offered no evidence to shew that the adjudication was made by a Court which had no jurisdiction to make it, but the defendant at the trial was willing to accept the adjudication as duly made. And if he had offered such evidence, it might not have been receivable, because the Court must have assumed that the preliminary facts necessary to prove the jurisdiction of the county court had been proved; but assuming that the Court is bound by the adjudication, it is equally bound to treat as conclusively ascertained the facts on which the jurisdiction depended. The plaintiff, however, claims to put forward the adjudication which was in truth made by a Court having no jurisdiction as conclusive, and asserts that this Court cannot inquire whether the proposition of fact is true on which such jurisdiction must be based; and then, to bring himself within s. 87, he turns round, and on the very same occasion when he has impliedly asserted that the debtor must be taken not to have been a trader in London, demands to be allowed to prove that he was such a trader. The reason why he takes this course is clear. He could not now commence proceedings again in the proper court with effect, for such proceedings would be too late. Therefore he insists on taking advantage of a petition in the wrong court, and alleges that the defendant, an execution creditor, is to be bound by an act of the petitioning creditor in the wrong court in a matter to which he was no party. It was urged that serious consequences would follow if the defendant's contention were maintained. I apprehend difficulties of this nature must always more or less exist with respect to courts of limited jurisdiction. But practically I do not think such serious consequences as those suggested would occur. The difficulty here has arisen only because the plaintiff in this case has found out the mistake too late to take proceedings in the right court with effect. The plaintiff in this case claims as a trustee in bankruptcy, and unless the county court had jurisdiction to adjudge Maxwell a bankrupt, the plaintiff has no title. In order to affirm his title as trustee, he insists that the county court had competent jurisdiction to adjudicate Maxwell bankrupt. And then to bring himself within the 87th section, he desires to give evidence which would shew that the adjudication was invalid. I cannot think he has power for one purpose to affirm a fact, for another to deny it. He appears to me, therefore, to be in a dilemma. Having to prove the adjudication by a Court of competent jurisdiction, and also the trading, if he proves one he cannot prove the other. Therefore it appears to me that the plaintiff cannot bring this case within the 87th section, and the common law right of the defendant as execution-creditor is not ousted. For these reasons I am of opinion that the rule should be made absolute.

Grove, J. I am of opinion that the plaintiff is entitled to succeed in this case. It was argued for the defendant, first, that the county court had no jurisdiction, and, consequently, that the adjudication was invalid; and, secondly, that assuming there was jurisdiction, the adjudication is conclusive that the debtor was adjudicated bankrupt as a non-trader. It appears to me more convenient to take the second point first, inasmuch as it seems to throw some light on the first. The adjudication describes the bankrupt as a gentleman. Assuming for the present purpose that the word "gentleman" is something more than mere description, and is equivalent to "non-trader," does it form any essential part of the adjudication? In other words, is it necessary that the adjudication should contain an allegation that the bankrupt is a trader or not? The defendant's counsel is driven to admit that the necessary consequence would be, that without such allegation the adjudication would be bad. It is very singular, if so, that there is nothing in the Act or the rules either directly or indirectly supporting this proposition. The 10th section enacts that the copy of the *Gazette* shall be conclusive evidence of the debtor having been duly adjudged a bankrupt. If the word "duly" were omitted, no question could arise, for all that then could be required would be that the debtor should have been adjudged a bankrupt in fact. Both parties rely on the word "duly." The plaintiff's counsel contend that it includes all the necessary preliminaries of bankruptcy, and that the adjudication is conclusive as to those only. The defendant's counsel argues that it applies to the matters appearing in the forms of the adjudication, and so, if the debtor was adjudicated bankrupt as a non-trader, the adjudication is conclusive evidence that he is not a trader. It appears to me that the object of the section was to prevent the necessity of going behind the adjudication and inquiring into those preliminary matters which are necessary conditions of bankruptcy. As to all those matters the adjudication appears to me to be conclusive; but if the Act intended that it should be stated on the face of the adjudication whether the bankrupt was a trader or not, it is like the play of "Hamlet" with the part of Hamlet left out, for it has never provided anywhere that the adjudication shall be against the bankrupt as a trader or a non-trader. The object appears to me to have been to make the order of adjudication conclusive for the purposes of the adjudication; but that, as such purposes do not include the question whether the bankrupt is a trader or not, with respect to the consequences of adjudication it is not conclusive as to that question. With regard to the other point, the question is as to the meaning of the 59th section. Does that section so limit the jurisdiction of the local court that the whole of the proceedings are invalid if any of the requirements of the section are wanting? The consequences seem very formidable if at any time after the commencement of the proceedings (possibly after a series of appeals ending in the House of Lords), the whole may turn out to be a nullity by reason of some fact, which perhaps it was impossible for the parties to discover earlier, as, for instance, that the bankrupt, though primâ facie within the jurisdiction of the county court, in reality carried on a secret trade in London. I do not think we ought to accept such a construction of the Act unless the words peremptorily compel us to do so. I do not think the requirements of the 59th section can be looked on as merely directory, but may it not be construed as meaning to make it compulsory on the Court, on the institution of the proceedings, to inquire as to the existence of what is in the nature of a condition precedent to its exercising jurisdiction, but that, subject to the right of appeal, when the Court has satisfied itself on the evidence before it of the existence of jurisdiction, and accordingly adjudicates, such adjudication shall be final, and shall not be ripped up by proof of the non-existence of any preliminary essential to jurisdiction? There is nothing inconsistent in this construction of the 10th section with the words of the 59th section.

To apply this construction of the Act to the present case, and the 87th section, on which it depends, it is necessary for the purposes of that section that Maxwell should have been adjudicated bankrupt, and should have been a trader. On the evidence before the county court there appeared to be a primâ facie case of jurisdiction, and on that the county court rightly adjudicated. On such adjudication it was not necessary to pronounce whether the bankrupt was a trader or not, but simply that he was a bankrupt, with all the consequences of bankruptcy. All the acts which are acts of bankruptcy in a non-trader are also acts of bankruptcy in a trader. With reference to such acts of bankruptcy the question is immaterial whether a man is a trader or not. There are other consequences incidental to bankruptcy which depend on the question, but they depend on the fact of trading or not, and not on the form of adjudication. The 87th section does not say the goods of a person adjudicated bankrupt as a trader, but of a trader. There are no doubt difficulties involved in the views presented by either party in this case; but it seems to me the balance of convenience is in favour of the plaintiff's view. The inconveniences suggested by the defendant appear to be remediable. There is an opportunity of appealing if hardship or injury may arise from an adjudication in a wrong district. The inconveniences caused by the invalidity of the whole proceedings in such a case are irremediable. For these reasons, and those stated by my Lord, with which I fully agree, I think this rule should be discharged.

Rule discharged.

Attorneys for plaintiff: *Brooksbank & Galland.*
Attorney for defendant: *Rae.*

[IN THE EXCHEQUER CHAMBER.]

1872
May 23.

COCKLE *v.* THE LONDON AND SOUTH EASTERN RAILWAY COMPANY.

Negligence—Railway Company—Invitation to Passenger to Alight—Evidence for the Jury.

9 QB 70-1
9 QB 129, 13
132-3
[illegible]
216
10 QB 272
2 QBD 87
9 Ex D 252

The plaintiff was a traveller on the defendants' line of railway by a train which arrived at the station for which the plaintiff was bound at night. The part of the platform at that station at which passengers could alight was of sufficient length for the whole train to have been drawn up alongside of it, but in addition to that part the platform extended some distance gradually receding from the rails. When the train drew up the body of it was alongside the platform, but the last carriage, in which plaintiff rode, was opposite the receding part of the platform and about four feet from it. The night was very dark, and the place where the last carriage stopped was not lighted, though the rest of the station was well lighted with gas. There was no express invitation given to the plaintiff by the company's servants to alight, but the train had been brought to a final standstill and did not move on again until it started on its onward journey. No warning was given to the plaintiff that the carriage was not close to the platform or that care would be necessary in alighting. The plaintiff opened the carriage door and, stepping out, fell into the space between the carriage and the platform, and sustained injuries, for which she brought an action against the company:—

Held, that there was evidence of negligence on the part of the defendants' servants to go to the jury.

Bringing a railway carriage to a standstill at a place at which it is unsafe for a passenger to alight, under circumstances which warrant the passenger in believing that it is intended he shall get out, and that he may do so with safety, without any warning of his danger, amounts to negligence on the part of the company, for which, in the absence of contributory negligence on the part of the passenger, an action may be maintained.

Praeger v. *Bristol and Exeter Ry. Co.* (24 L. T. (N.S.), 105), followed; *Siner* v. *Great Western Ry. Co.* (Law Rep. 4 Ex. 117); and *Bridges* v. *North London Ry. Co.* (Law Rep. 6 Q. B. 377), distinguished.

APPEAL from the decision of the Court of Common Pleas discharging a rule to enter a nonsuit on the ground that there was no evidence of negligence to go to the jury.

The pleadings are set out in the report of the case in the court below (1), and the facts sufficiently appear in such report and the judgment.

Feb. 10. *O'Malley, Q.C.* (*F. M. White* with him), for the appellants, the defendants.

---

(1) Law Rep. 5 C. P. 457.

1872

COCKLE v. LONDON AND SOUTH EASTERN RAILWAY CO.

Gibbons (*Macrae Moir* with him), for the respondent, the plaintiff. The arguments used and the cases cited were the same as in the court below.

Cur. adv. vult.

May 23. The judgment of the Court (Cockburn, C.J., Blackburn and Mellor, JJ., and Pigott and Cleasby, BB.) was delivered by

COCKBURN, C.J. This was an appeal to the Court by the defendants under the provisions of the Common Law Procedure Act, 1854, against the decision of the Court of Common Pleas in discharging a rule obtained by the defendants upon a point reserved at the trial as to whether there was any evidence for the jury in support of the plaintiff's claim. The Court having been divided in opinion, the rule nisi dropped. The facts may be shortly stated. The defendants are carriers of passengers from the Spa Road Station to Deptford Station on the line of railway between London and Greenwich. The plaintiff, who lived at Deptford, on the 20th of March, 1869, took a ticket from the Spa Road Station to the Deptford Station, and travelled on the journey in a train from the Spa Road Station which was due at Deptford about midnight. The carriage in which she travelled was a third-class carriage, and was the last carriage in the train. The platform at Deptford was of sufficient length for the whole train to have been drawn up alongside of it, but in addition to the part at which passengers could alight it extended some distance gradually receding from the rails. The train in question drew up with the body of the train alongside the platform, but the last carriage, in which the plaintiff rode, was opposite the receding part of it, at which passengers could not alight and was about four feet from it. The trains did not usually draw up at this spot, nor could the passengers alight there with safety. The part of the platform at which the train would in the ordinary course have stopped was well lighted with gas lamps, but the lights towards the place where the accident happened had been put out, because at that place the trains did not usually stop or the passengers alight. There was a lamp-post opposite the point where the plaintiff's carriage stopped, the lamp on which was not lighted and the place was dark. It was a very dark night. Just before the train stopped a woman who was in the same carriage with the plaintiff rose for the purpose of getting out, but was told by the plaintiff to wait until the train had stopped. When the train had stopped the plaintiff waited for the woman to get out, but as she did not do so, opened the door and stepped out. On doing so she fell in the space between the carriage and the platform, a space wide enough for three people to stand abreast, and was injured by the fall. There was no evidence of any invitation to alight having been given by any of the defendants' servants. But it is clear that the train had been brought to a final standstill, as it was not again set in motion until it started on its onward journey. No warning appears to have been given to the persons in the carriage in which the plaintiff was not to alight until the plaintiff had been seen to fall, when, on the woman before referred to attempting to follow her, a cry of "Hold hard" was heard.

2 QBD

The question is, whether these facts afford evidence to go to the jury of negligence on the part of the company's servants. We are of opinion that they do. It is difficult to reconcile all the cases on this subject. Each must, of course, very much turn on its own particular facts; but there is a recent case decided in this court which is analogous to the case now before us, and the principle of which appears to us applicable to it. The case to which we refer, *Praeger* v. *Bristol and Exeter Ry. Co.*, though an important one, has not found its way into the regular reports. It is, however, to be found in the 24th vol. of the Law Times Reports, New Series, p. 105, where it is very fully and ably reported(1) In that case a train, in which the plaintiff was a passenger, arrived at a terminus, and was stopped fifteen or twenty feet short of the fixed buffers placed at the extreme limit to which it might have gone. The platform of the station at the end which was first reached by the train, instead of having its edge parallel with the line of rails used by the arriving trains, was bevelled off into a curve so as to allow space for a siding which there joined that line of rails. The plaintiff sat in the last compartment of the last carriage, which was drawn up opposite the curved part of the platform, so that a space of eighteen inches or two feet was left between them. A guard opened the door, but said nothing. It was a dark evening, and the station was dimly lighted. The

7 HL 217

10 QB 27

(1) See also L R 6 Q B 4[illegible]

1872

COCKLE
v.
LONDON
AND SOUTH
EASTERN
RAILWAY CO.

[illegible]
10 QB 278

plaintiff stepped out expecting to alight on the platform, and fell between the carriage and the platform, thereby sustaining injuries in respect of which he brought his action against the company. Upon these facts, in the Court of Exchequer, Kelly, C.B., and Pigott, B., Martin, B., dissentiente, held that there was no evidence of negligence to go to the jury. But the Court of Exchequer Chamber, consisting of seven judges, were unanimously of opinion that there was evidence of negligence, and reversed the decision. As the case in question has not been more generally reported, it may be desirable to repeat the judgments pronounced on the occasion in question. Cockburn, C.J., says as follows: "I adopt most readily the formula which has been suggested as applicable to these cases, viz., that the company are bound to use reasonable care in providing accommodation for passengers, and that the passengers also are bound to use reasonable care in availing themselves of the accommodation provided for them. Therefore, I agree that a passenger is bound to use reasonable care in alighting on the platform or elsewhere when it becomes necessary for him to alight; and if this case had been referred to us on the ground of want of reasonable care in the plaintiff it would have been an answer to say that he had not used it. The question is whether there was a want of reasonable care on the part of the company, and I think there was not only evidence but abundant evidence of this. It appears that the construction of the railway and platform is such that a train coming to the station has to pass by a curve of the platform, and that if the carriage is stopped alongside a certain portion of the platform a considerable space is left between them, and if there were three or four carriages, probably only those near the engine could be brought up flush with the platform.

It has been said that it is not always possible to bring up carriages to the platform at stations, and one's own experience tells us that this is true. The train may sometimes stop short of the platform, or shoot beyond it, and the passengers may in consequence have to alight elsewhere than on the platform. Still the purpose always is to bring all the carriages, if possible, to a level with the platform, and therefore a railway traveller is entitled to expect that when he steps out he will step on to the platform. But I agree that if it be daylight, a man being bound to use his eyesight,

1872

COCKLE
v.
LONDON
AND SOUTH
EASTERN
RAILWAY CO.

if the passenger sees that the carriage is not in the ordinary position with reference to the platform he must not complain if, there being no actual danger, he has to use a little more care than usual in getting out. If the position be such that there is some extraordinary difficulty or danger he must consider what he will do. He may call to the servants of the company to bring the carriage into its proper position; but there may be circumstances in which it is impossible to make such an application, or he may have no opportunity of making it, or the application may be refused. It is possible that from urgent natural necessity he may be obliged to alight. Under such circumstances as these I am far from saying that he might not have a right of action if he suffered injury while so alighting. But these considerations are not involved in the present case. The state of things here was that, whereas the carriage in which the plaintiff was would have been brought up to the platform if the train had moved further, the plaintiff got out, believing he was going to step on to the platform. Instead of that he fell between the carriage and the platform. He got out on the invitation of the guard who opened the door, which implied an invitation to alight, and I think, also, to alight with safety. Under such circumstances a person would be justified in expecting to step on to the platform, and it was incumbent on the guard if he intended passengers to get out, to warn them of the position of the platform. He gave no such warning, and the omission seems to me to amount to negligence, which is the whole question." Willes, Keating, and Brett, JJ., were of the same opinion. Mellor, J., said, "There was not sufficient light at the station to enable a person in the situation of the plaintiff to alight without exercising an unusual degree of care." M. Smith, J., said, "Whilst adhering to the case of *Siner* v. *Great Western Ry. Co.* (1), I consider that case distinguishable from the present on two grounds: first, because here there was a clear invitation to alight by the guard opening the door; and, secondly, because here the danger to be incurred was not apparent. The negligence of the company consisted in drawing up the train as it was drawn up, and inviting the passengers to alight without giving them any warning of the state of the platform, there being also evidence of a want of

(1) Law Rep. 4 Ex. 117.

1872

COCKLE
v.
LONDON
AND SOUTH
EASTERN
RAILWAY CO

sufficient light." Lush, J., said, "I consider that the company did not do what they might have done under the circumstances. The train was drawn up so that part of it was short of the proper platform, and an unusual space was left between the compartment in which the plaintiff travelled and the platform. The guard opened the door without giving any caution. Looking also at the time of day and the state of the light, it seems to me that it was for the jury to say whether the injury to the plaintiff was caused by the company's negligence or by other causes."

2QBD87

The foregoing case appears to us in point to the present, as establishing that an invitation to passengers to alight on the stopping of a train, without any warning of danger to a passenger who is so circumstanced as not to be able to alight without danger, such danger not being visible and apparent, amounts to negligence. It is true that, in the case before us, there was not the invitation to alight which is implied in the opening of the carriage-door, as occurred in the case of *Praeger* v. *Bristol and Exeter Ry. Co.* (1). But it appears to us that the bringing up of a train to a final standstill, for the purpose of the passenger's alighting, amounts to an invitation to alight, at all events, after such a time has elapsed that the passenger may reasonably infer that it is intended that he should get out if he purposes to alight at the particular station. It is not necessary here, any more than in *Praeger* v. *Bristol and Exeter Ry. Co.* (1), to say what would be the effect if a passenger should alight when the danger was visible and apparent; as where a passenger gets out in broad day, trusting to his ability to overcome the difficulty. In the case before us the place where the plaintiff was left to get out was not lighted, and she could not see, and was not aware of the interval which separated the carriage from the platform, and got out believing she was about to step on to the platform. We think that the leaving a carriage which has been brought up to a place at which it is unsafe for a passenger to alight, under circumstances which warrant the passenger in believing that it is intended he shall get out, and that he may therefore do so with safety, without any warning of his danger, amounts to negligence on the part of the company, for which, at least in the absence of contributory negligence on the part of the passenger, an action may be maintained. The case is distinguishable from that of *Bridges* v. *North London Ry. Co.* (1) on the ground that in the latter the carriage from which the passenger alighted had been drawn up in a tunnel in the vicinity of the station. In that case there was no evidence that the train had come to a final standstill, or, in other words, arrived at the spot where the company's servants intended the passengers to alight. The question, therefore, was whether there was evidence of anything done by the company's servants which induced the passenger to believe it had so arrived, and act on that belief. But in the present case the evidence of the conduct of the company's servants was such as to warrant the jury in finding that the train had really come to the final standstill, and the company's servants meant the passengers to get out there or be carried on. Of course, a multo fortiori, the jury might find that that conduct was such as to induce the plaintiff to think so, and to act upon that belief. We are, therefore, of opinion that the rule nisi to enter the verdict for the defendants was properly discharged by the Court of Common Pleas.

---

(1) 24 L. T. (N.S.) 105.

Judgment affirmed.

Attorney for plaintiff: *W. H. Smith.*
Attorney for defendants: *E. P. Cearns.*

(1) Law Rep. 6 Q. B. 377.

[IN THE EXCHEQUER CHAMBER.]

1872
May 23.

HOLLAND AND ANOTHER *v.* HODGSON AND ANOTHER.

Fixtures—Mortgagor and Mortgagee.

8 Q.B. 793
8 Ch 1074
7 H.L. 485,
14 Ch D 383
387

The owner in fee of a worsted mill, at which he carried on the business of a worsted spinner and stuff manufacturer, mortgaged it to the plaintiffs. By a deed of arrangement under the Bankruptcy Act, 1861, subsequently executed, the mortgagor assigned all his property to the defendants as trustees for the benefit of his creditors. Under this latter deed the defendants seized certain looms which were in the mill that was mortgaged. These looms were attached to the stone floors of the rooms of the mill by means of nails driven through holes in the feet of the looms, in some cases into beams which had been built into the stone, and in other cases into plugs of wood driven into holes drilled in the stone for the purpose. It was necessary that the looms should be so attached for the purpose of steadying them and keeping them in a true direction, perpendicular to the line of the shafting, by means of which the steam power was applied to them. It was impossible to remove the looms without drawing the nails; but this could be done easily and without any serious damage to the flooring. The plaintiffs brought trover for the looms:—

Held (affirming the decision of the Court below), that the looms passed by the mortgage of the mill as part of the realty, and the action was therefore maintainable.

Mather v. *Fraser* (2 K. & J. 536)(a), and *Longbottom* v. *Berry* (Law Rep. 5 Q. B. 123), followed; *Hellawell* v. *Eastwood* (6 Ex. 295) discussed.

ERROR from the judgment of the Court of Common Pleas in favour of the plaintiffs upon a special case stated by order of nisi prius in the following terms:—

1. George Mason, of Horton, near Bradford, in Yorkshire, in the year 1869 carried on the business of a worsted spinner and stuff manufacturer at Bank Top Mill, at Horton, aforesaid, of which he was owner.

2. By a mortgage, dated the 7th of April, 1869, the said George Mason conveyed to the plaintiffs in fee the said mill, with several closes of land, cottages, and other hereditaments and premises therein described, the parcels thereof, so far as they relate to the said mill being as follows:—"All that worsted mill lately occupied by the firm of Messrs. Thomas Ackroyd and Sons, situate at Horton Bank Top, in the parish of Bradford, in the county of York, with the warehouse, counting-house, engine-house, boiler-house, weaving shed, washhouse, gasworks, and reservoirs belong-

(a) S.C. 2 Jur N.S. 900

ing, adjoining, or near thereto, and also the steam-engine, shafting, going-gear, machinery, and all other fixtures whatever which now or at any time hereafter during the continuance of this security shall be set up and affixed to the said hereditaments and premises hereby granted and assured or intended so to be, or any part thereof." The said deed, which may be referred to by either party, was not registered under the Bills of Sale Act.

3. The said George Mason, by a deed dated the 3rd of July, 1869, assigned to the defendants all his estate and effects, to be administered as under a bankruptcy. The said deed was duly registered, and everything happened to make it a valid deed under s. 192 of the Bankruptcy Act, 1861, and the clauses of the Bankruptcy Amendment Act, 1868, relating to such deeds.

4. Under the last-mentioned deed the defendants took possession of, and sold, amongst other things in the said mill, the property mentioned in the next paragraph as claimed by the plaintiffs. Other articles both in the Bank Top Mill and in another mill, which had been also mortgaged by the said George Mason to the plaintiffs, have been in dispute between the plaintiffs and the defendants, but by abandonment of some claims and payment into court as to others, the matters in dispute are now reduced to the articles mentioned in the next paragraph.

5. The plaintiffs claim the following articles as passing by the words of the deed of the 7th of April, 1869, set out in the 2nd paragraph: 436 looms sold at 1038*l.* 4*s.* (1).

6. The looms, which are the machines for weaving worsted stuff and other fabrics, were placed in various rooms in Bank Top Mill, some on the ground floor and some on the first floor. In all cases they were driven by steam power, which was applied to them in the following manner: The steam-engine worked or gave motion to the shafting and going-gear, which consisted of long shafts passing from one end to the other of each room, and having fixed upon them at proper intervals large concentric wheels called drums, from which the required motion was communicated to the looms by means of leather bands, which could be applied to, and

---

(1) Other articles were mentioned in this paragraph of the case, but it is unnecessary to enumerate them, as the case was not argued with respect to them.

1872

HOLLAND
v.
HODGSON.

disconnected from, the looms at pleasure. The steam-engine and the shafting and going-gear were unquestionably fixtures, and passed as such to the plaintiffs under their said mortgage.

The looms slightly varied in size, but each was about 7 ft. long by 3 ft. wide, and from 3 to 4 ft. high, and weighed about 7 or 8 cwt. Each loom stood upon four feet, one at each corner, each foot being a flat piece of iron about 3 in. long by 1½ in. broad, with a hole drilled through it about three-eighths of an inch in diameter. It is essential to the proper working of a loom that it should stand on a level, and be steady and keep its true direction perpendicular to the line of the shafting. If it merely rested by its own weight upon the floor, it would be liable in working to be shaken and drawn sideways from the true line. In order to keep the looms in question steady and in their proper position for working, the following methods were adopted:—

In the case of the looms which were in rooms on the ground floor, the floors of which rooms were formed throughout of stone flags, the method adopted was as follows: Holes about half an inch or three-quarters in diameter were drilled or cut in the stone floor in the places where two of the four feet of each loom at opposite corners would stand. Into each of these holes was driven a plug of wood, so as to fill it up completely and make a tight fit. Then the loom was placed in position and brought to a proper level by thin pieces of wood packed, where necessary, under the loom feet, and then a nail about 4 in. long, in some cases with a flat head, and in others with a square bolted head, was driven through the hole in the loom feet into the wooden plug. The other two feet of each loom were left free. In the case of the looms which were in rooms on the upper floors, the method adopted for keeping the looms steady and in their proper position for working was somewhat different. The floors of these rooms, like the others, were principally formed of stone flags, but beams of wood about 4 in. wide and 3 in. thick were built into the floor along the lines upon which the loom feet stand, and the nails used for keeping the looms in these rooms steady and in their proper position for working were driven at once into these beams, instead of into wooden plugs, as in the case of the looms on the ground-floor rooms. The rooms in the upper floors were built and arranged specially to receive the looms, and the purpose for which the beams were introduced was to supersede the necessity of drilling or cutting holes for the wooden plugs. After the nails had been driven into the wooden plugs or beams, as above described, the looms could not be removed without drawing the nails from the wooden plugs or beams, but this could easily be done without any serious injury to the floors. It was not necessary, for the purpose of keeping the looms in their proper positions for working, that the nails so driven into the wooden plugs or beams, as above described, should have heads. Spikes without heads would equally have answered the purpose, and if such spikes had been used the looms could have been lifted up and removed and again placed in their proper position for working without disturbing or removing the spikes.

Paragraphs 7, 8, and 9 of the case referred to articles mentioned in the 5th paragraph, the facts in relation to which it is not necessary to set out, inasmuch as they were not the subject of controversy in the argument.

10. Amongst the articles in the Bank Top Mill which were sold by the defendants, and which were claimed by the plaintiffs under their said mortgage, but as to which there is now no dispute between the parties, the defendants having paid money into court in respect of the same, there were several articles of machinery, besides the steam-engine and the shafting and going-gear, which were unquestionably fixtures, and passed, as such, to the plaintiffs under the said mortgage.

11. The question for the opinion of the Court is, whether any and which of the articles now in dispute passed to the plaintiffs as against the defendants.

The Court of Common Pleas (Willes, Keating, and Montague Smith, JJ.) gave judgment for the plaintiffs as to the looms, it being admitted by the counsel for the defendants that the case was, as to them, undistinguishable from *Longbottom* v. *Berry* (1), upon which judgment the defendants brought error.

Dec. 1, 1871; Feb. 9, 1872. *Field, Q.C.* (*Kemplay, Q.C.* with him), for the defendants, contended that the looms were not so annexed to the freehold as to be fixtures, but that being annexed

---

(1) Law Rep. 5 Q. B. 123.

1872

HOLLAND *v.* HODGSON.

slightly merely for the purpose of their convenient use as chattels and not to improve the inheritance, they remained merely chattels. They cited *Hellawell* v. *Eastwood* (1); *Longbottom* v. *Berry* (2); *Parsons* v. *Hinde* (3); *Turner* v. *Cameron* (4); *Hutchinson* v. *Kay* (5); *Cullwick* v. *Swindell* (6); *Mather* v. *Fraser* (7); *Walmsley* v. *Milne* (8); *Trappes* v. *Harter* (9); *Waterfall* v. *Penistone* (10); *Climie* v. *Wood* (11); *Lancaster* v. *Eve* (12); *Boyd* v. *Shorrock* (13); *Wood* v. *Hewett* (14); *Reg.* v. *Lee* (15); *Fisher* v. *Dixon* (16); *Ex parte Barclay* (17); *Gibson* v. *Hammersmith Ry. Co.* (18); *Martin* v. *Roe* (19); *Ex parte Cotton.* (20)

Cave, for the plaintiffs, contended that the articles in question were fixtures, and as such passed by the mortgage as part of the freehold. He cited *Haley* v. *Hammersley* (21); *Hallen* v. *Runder* (22); *Ex parte Bentley* (23); *Re Dawson, Tate, & Co.* (24)

Field, in reply, cited *Begbie* v. *Fenwick* (25); *The Patent Peat Company, Limited.* (26)

Cur. adv. vult.

May 23. The judgment of the Court (Kelly, C.B., Blackburn, Mellor, and Hannen, JJ., and Channell and Cleasby, BB.) was delivered by

BLACKBURN, J. In this case George Mason, who was owner in fee of a mill occupied by him as a worsted mill, mortgaged the mill and all fixtures which then were, or at any time thereafter should be set up and affixed to the premises, in fee to the plaintiffs. The mortgage deed was not registered as a bill of sale, and Mason, who continued in possession, assigned all his estate and effects to the defendants as trustees for the benefit of his creditors. The defendants under this last deed took possession of everything. The plaintiffs brought trover. The defendants paid money into court, and there was a replication of damages ultra. A case was stated shewing the nature of the articles, and how and in what manner they were affixed to the mill. As the deed was not registered under the Bills of Sales Act (17 & 18 Vict. c. 36), it was by s. 1 of that Act void as against the defendants as assignees for the benefit of creditors so far as it was a transfer of "personal chattels" within the meaning of that Act; and as by s. 7 the phrase "personal chattels" is declared in that Act to mean inter alia "fixtures;" it was void (as against these defendants) so far as it was a transfer of fixtures as such. Since the decision of this Court in *Climie* v. *Wood* (1) it must be considered as settled law (except perhaps in the House of Lords) that what are commonly known as trade or tenant's fixtures form part of the land, and pass by a conveyance of it; and that though if the person who erected those fixtures was a tenant with a limited interest in the land he has a right, as against the freeholder, to sever the fixtures from the land, yet if he be a mortgagor in fee he has no such right as against his mortgagee. Trade and tenant's fixtures are, in the judgment in that case, accurately defined as "things which are annexed to the land for the purposes of trade or of domestic convenience or ornament in so permanent a manner as to become part of the land, and yet the tenant who has erected them is entitled to remove them during his term, or it may be within a reasonable time after its expiration." It was not disputed at the bar that such was the law; and it was admitted, and we think properly admitted, that where there is a conveyance of the land the fixtures are transferred, not as fixtures, but as part of the land, and the deed of transfer does not require registration as a bill of sale. But we wish to guard ourselves by stating that our decision (so far as regards the registration) is confined to the case before us, where the mortgagor was owner to the same extent

---

(1) 6 Ex. 295; 20 L. J. (Ex.) 154.
(2) Law Rep. 5 Q. B. 123.
(3) 14 W. R. 860.
(4) Law Rep. 5 Q. B. 306.
(5) 23 Beav. 413; 26 L. J. (Ch.) 457.
(6) Law Rep. 3 Eq. 249.
(7) 2 K. & J. 536; 25 L. J. (Ch.) 361. 2 Jur N.S. 960
(8) 7 C. B. (N.S.) 115; 29 L. J. (C.P.) 97. 6 Jur N.S. 126
(9) 2 C. & M. 153.
(10) 6 E. & B. 876; 26 L. J. (Q.B.) 100. 3 Jur N.S. 16
(11) Law Rep. 3 Ex. 257; Law Rep. 4 Ex. 328.
(12) 5 C. B. (N.S.) 717; 28 L. J. (C.P.) 235. 5 Jur N.S. 683.

(5) S.C. 3 Jur N.S. 653.

(13) Law Rep. 5 Eq. 72.
(14) 8 Q. B. 913.
(15) Law Rep. 1 Q. B. 241.
(16) 12 Cl. & F. 312.
(17) 5 D. M. & G. 403. 1 Jur N.S. 1145
(18) 2 Dr. & S. 603; 32 L. J. (Ch.) 337. 9 Jur N.S. 921
(19) 7 E. & B. 237; 25 L. J. (Q.B.) 129. 3 Jur N.S. 465.
(20) 2 M. D. & D. 725.
(21) 3 D. F. & J. 587; 30 L. J. (Ch.) 771.
(22) 1 C. M. & R. 266.
(23) 2 M. D. & D. 591.
(24) Ir. Law. Rep. 2 Eq. 218.
(25) 24 L. T. (N.S.) 58.
(26) 17 L. T. (N.S.) 69.

---

(1) Law Rep. 4 Ex. 328.

1872

HOLLAND
v.
HODGSON.

8 QB 292.

of the fixtures and of the land. If a tenant having only a limited interest in the land, and an absolute interest in the fixtures, were to convey not only his limited interest in the land and his right to enjoy the fixtures during the term, so long as they continued a part of the land, but also his power to sever those fixtures and dispose of them absolutely, a very different question would have to be considered. As it does not arise, we decide nothing as to this. We are not to be understood as expressing dissent from what appears to have been the opinion of Wood, V.C., in *Boyd* v. *Shorrock* (1), but merely as guarding against being supposed to confirm it. In *Climie* v. *Wood* (2) the jury had found as a fact that the articles there in question were tenant fixtures, and that finding was not questioned. Neither the Court of Exchequer nor the Court of Exchequer Chamber had occasion there to consider what would constitute a fixture. In the present case there is no such finding. The controversy was confined to the looms, the nature of which, and the mode of their annexation, were described in the case. In the court below it was properly admitted that there was no real distinction between those looms and the articles which the Court of Queen's Bench, in *Longbottom* v. *Berry* (3), decided to be so annexed as to form part of the land. Judgment was accordingly given for the plaintiffs, without argument, leaving the defendants to question *Longbottom* v. *Berry* (3) in a court of error.

The present case is therefore really, though not in form, an appeal against the decision of the Court of Queen's Bench in *Longbottom* v. *Berry* (3), and was so argued. There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz., the degree of annexation and the object of the annexation. When the article in question is no further attached to the land, then by its own weight it is generally to be considered a mere chattel; see *Wiltshear* v. *Cottrell* (4), and the cases there cited. But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land: see *D'Eyncourt* v. *Gregory.* (1) Thus blocks of stone placed one on the top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones, if deposited in a builder's yard and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels. On the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to shew that it was never intended to be part of the land, and then it does not become part of the land. The anchor of a large ship must be very firmly fixed in the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the land, even though it should chance that the shipowner was also the owner of the fee of the spot where the anchor was dropped. An anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge would be part of the land. Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel. This last proposition seems to be in effect the basis of the judgment of the Court of Common Pleas delivered by Maule, J., in *Wilde* v. *Waters.* (2) This, however, only removes the difficulty one step, for it still remains a question in each case whether the circumstances are sufficient to satisfy the onus. In some cases, such as the anchor of the ship or the ordinary instance given of a carpet nailed to the floor of a room, the nature of the thing sufficiently shews it is only fastened as a chattel temporarily, and not affixed permanently as part of the land. But ordinary trade or tenant fixtures which are put up with the intention that they

---

(1) Law Rep. 5 Eq. 72.

(2) Law Rep. 4 Ex. 328.

(3) Law Rep. 5 Q. B. 123.

(4) 1 E. & B. 674; 22 L. J. (Q.B.) 177.

17 Jur 758

(1) Law Rep. 3 Eq. 382. (2) 16 C. B. 637; 24 L. J. (C.P.) 193. 1 Jur NS 1021

1872

HOLLAND
v.
HODGSON.

should be removed by the tenant (and so are put up for a purpose in one sense only temporary, and certainly not for the purpose of improving the reversionary interest of the landlord) have always been considered as part of the land, though severable by the tenant. In most, if not all, of such cases the reason why the articles are considered fixtures is probably that indicated by Wood, V.C., in *Boyd* v. *Shorrock* (1), that the tenant indicates by the mode in which he puts them up that he regards them as attached to the property during his interest in the property. What we have now to decide is as to the application of these rules to looms put up by the owner of the fee in the manner described in the case. In *Hellawell* v. *Eastwood* (2) (decided in 1851) the facts as stated in the report are, that the plaintiff held the premises in question as tenant of the defendants, and that a distress for rent had been put in by the defendants under which a seizure was made of cotton-spinning machinery called "mules," some of which were fixed by screws to the wooden floor, and some by screws which had been sunk in the stone floor, and secured by molten lead poured into them. It may be inferred that the plaintiff being the tenant only had put up those mules; and from the large sum for which the distress appears to have been levied (2000*l.*) it seems probable that he was the tenant of the whole mill. It does not appear what admissions, if any, were made at the trial, nor whether the Court had or had not by the reservation power to draw inferences of fact, though it seems assumed in the judgment that they had such a power. Parke, B., in delivering the judgment of the Court, says, "This is a question of fact depending on the circumstances of each case, and principally on two considerations; first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed integrè salve et commode or not without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the civil law, perpetui usûs causâ, or in that of the year book, pour un profit del'inheritance, or merely for a temporary purpose and the more complete enjoyment and use of it as a chattel." It was contended by Mr. Field that the decision in *Hellawell* v. *Eastwood* (1) had been approved in the Queen's Bench in the case of *Turner* v. *Cameron*. (2) It is quite true that the Court in that case said that it afforded a true exposition of the law as applicable to the particular facts upon which the judgment proceeded; but the Court expressly guarded their approval by citing from the judgment delivered by Parke, B., the facts upon which they considered it to have proceeded: "They were attached slightly so as to be capable of removal without the least injury to the fabric of the building or to themselves, and the object of the annexation was not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels." As we have already observed, trade or tenant fixtures might in one sense be said to be fixed "merely for a temporary purpose;" but we cannot suppose that the Court of Exchequer meant to decide that they were not part of the land, though liable to be severed by the tenant.

---

(1) Law Rep. 5 Eq. at p. 78.

(2) 6 Ex. 295; 20 L. J. (Ex.) 154.

The words "merely for a temporary purpose" must be understood as applying to such a case as we have supposed, of the anchor dropped for the temporary purpose of mooring the ship, or the instance immediately afterwards given by Parke, B., of the carpet tacked to the floor for the purpose of keeping it stretched whilst it was there used, and not to a case such as that of a tenant who, for example, affixes a shop counter for the purpose (in one sense temporary) of more effectually enjoying the shop whilst he continues to sell his wares there. Subject to this observation, we think that the passage in the judgment in *Hellawell* v. *Eastwood* (1) does state the true principles, though it may be questioned if they were in that case correctly applied to the facts. The Court in their judgment determine what they have just declared to be a question of fact thus: "The object and purpose of the connection was not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels." Mr. Field was justified in saying, as he did in his argument, that as far as the facts are stated in the report they are very like those in the present case, except that the tenant who put the mules up cannot have been supposed to intend to improve the inheritance (if by that is meant his landlord's reversion), but only at most to

(1) 6 Ex. 295; 20 L. J. (Ex.) 154. (2) Law Rep. 5 Q. B. 306.

improve the property whilst he continued tenant thereof; and he argued with great force that we ought not to act on a surmise that there were any special facts or findings not stated in the report, but to meet the case, as shewing that the judges who decided *Hellawell* v. *Eastwood* (1) thought that articles fixed in a manner very like those in the case before us remained chattels; and this is felt by some of us at least to be a weighty argument. But that case was decided in 1851. In 1853 the Court of Queen's Bench had, in *Wiltshear* v. *Cotterill* (2), to consider what articles passed by the conveyance in fee of a farm. Among the articles in dispute was a threshing machine, which is described in the report thus: "The threshing machine was placed inside one of the barns (the machinery for the horse being on the outside), and there fixed by screws and bolts to four posts which were let into the earth." *Hellawell* v. *Eastwood* (1) was cited in the argument. The Court (without, however, noticing that case) decided that the threshing machine, being so annexed to the land, passed by the conveyance. It seems difficult to point out how the threshing machine was more for the improvement of the inheritance of the farm than the present looms were for the improvement of the manufactory; and in *Mather* v. *Fraser* (3) Wood, V.C., who was there judge both of the fact and the law, came to the conclusion that machinery affixed not more firmly than the articles in question by the owner of the fee to land, for the purpose of carrying on a trade there, became part of the land. This was decided in 1856. And in *Walmsley* v. *Milne* (4) the Court of Common Pleas, after having their attention called to a slight misapprehension by Wood, V.C., of the effect of *Hellawell* v. *Eastwood* (1), came to the conclusion, as is stated by them, at p. 131, "that we are of opinion, as a matter of fact, that they were all firmly annexed to the freehold for the purpose of improving the inheritance, and not for any temporary purpose. The bankrupt was the real owner of the premises, subject only to a mortgage which vested the legal title in the mortgagee until the repayment of the money borrowed. The mortgagor first erected baths, stables and a coach-house, and other buildings, and then supplied them with the fixtures in ques-

2 Jur NS 960

(1) 6 Ex. 295; 20 L. J. (Ex.) 154.

(2) 1 E.&B. 674; 22 L. J. (Q.B.) 177.

17 Jur 758

(3) 2 K. & J. 536; 25 L. J. (Ch.) 361.

(4) 7 B.C. (N.S.) 115; 29 L. J. (C.P.) 97.

6 Jur NS 125

1872

HOLLAND
v.
HODGSON.

tion for their permanent improvement. As to the steam-engine and boiler, they were necessary for the use of the baths. The hay-cutter was fixed into a building adjoining the stable as an important adjunct to it, and to improve its usefulness as a stable. The malt-mill and grinding-stones were also permanent erections, intended by the owner to add to the value of the premises. They therefore resemble in no particular (except being fixed to the building by screws) the mules put up by the tenant in *Hellawell* v. *Eastwood*." (1) It is stated in a note to the report of the case that, on a subsequent day, it was intimated by the Court that Mr. Justice Willes entertained serious doubts as to whether the articles in question were not chattels. The reason of his doubt is not stated, but probably it was from a doubt whether the Exchequer had not, in *Hellawell* v. *Eastwood* (1), shewn that they would have thought that the articles were not put up for the purpose of improving the inheritance, and from deference to that authority. The doubt of this learned judge in one view weakens the authority of *Walmsley* v. *Milne* (2), but in another view it strengthens it, as it shews that the opinion of the majority, that as a matter of fact the hay-cutter, which was not more firmly fixed than the mules in *Hellawell* v. *Eastwood* (1), must be taken to form part of the land, because it was "put up as an adjunct to the stable, and to improve its usefulness as a stable," was deliberately adopted as the basis of the judgment; and it is to be observed that Willes, J., though doubting, did not dissent. *Walmsley* v. *Milne* (2) was decided in 1859. This case and that of *Wiltshear* v. *Cotterill* (3) seem authorities for this principle, that where an article is affixed by the owner of the fee, though only affixed by bolts and screws, it is to be considered as part of the land, at all events where the object of setting up the articles is to enhance the value of the premises to which it is annexed for the purposes to which those premises are applied. The threshing machine in *Wiltshear* v. *Cotterill* (3) was affixed by the owner of the fee to the barn as an adjunct to the barn, and to improve its usefulness as a barn, in much the same sense as the hay-cutter in *Walmsley* v. *Milne* (2) was affixed to the stable as an adjunct to it, and to improve its usefulness as a

6 Jur NS 125

(1) 6 Ex. 295; 20 L. J. (Ex.) 154. (2) 7 C. B. (N.S.) 115; 29 L. J. (C.P.) 97.

(3) 1 E. & B. 674; 22 L. J. (Q.B.) 177. 17 Jur 758

14 ChD 357

stable. And it seems difficult to say that the machinery in *Mather* v. *Fraser* (1) was not as much affixed to the mill as an adjunct to it and to improve the usefulness of the mill as such, as either the threshing machine or the hay-cutter. If, therefore, the matter were to be decided on principle, without reference to what has since been done on the faith of the decisions, we should be much inclined, notwithstanding the profound respect we feel for everything that was decided by Parke, B., to hold that the looms now in question were, as a matter of fact, part of the land. But there is another view of the matter which weighs strongly with us. *Hellawell* v. *Eastwood* (2) was a decision between landlord and tenant, not so likely to influence those who advance money on mortgage as *Mather* v. *Fraser* (1), which was a decision directly between mortgagor and mortgagee. We find that *Mather* v. *Fraser* (1), which was decided in 1856, has been acted upon in *Boyd* v. *Shorrock* (3) by the Court of Queen's Bench in *Longbottom* v. *Berry* (4), and in Ireland in *Re Dawson.* (5) These cases are too recent to have been themselves much acted upon, but they shew that *Mather* v. *Fraser* (1) has been generally adopted as the ruling case. We cannot, therefore, doubt that much money has, during the last sixteen years, been advanced on the faith of the decision in *Mather* v. *Fraser.* (1) It is of great importance that the law as to what is the security of a mortgagee should be settled; and without going so far as to say that a decision only sixteen years old should be upheld, right or wrong, on the principle that communis error facit jus, we feel that it should not be reversed unless we clearly see that it is wrong. As already said, we are rather inclined to think that, if it were res integra we should find the same way. We think, therefore, that the judgment below should be affirmed.

Judgment affirmed.

Attorneys for plaintiffs: *Jacobs, North, & Vincent, for North.*
Attorneys for defendants: *Flowers & Nussey.*

---

(1) 2 K. & J. 536; 25 L. J. (Ch.) 361. 2 Jur NS 900

(2) 6 Ex. 295; 20 L. J. (Ex.) 154.

(3) Law Rep. 5 Eq. 72.

(4) Law Rep. 5 Q. B. 123.

(5) Ir. Law Rep. 2 Eq. 222.

END OF EASTER TERM, 1872.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

TRINITY TERM, XXXV VICTORIA.

DENOON *v.* THE HOME AND COLONIAL ASSURANCE COMPANY.

1872
May 28.

Marine Insurance—Valued Policy on Freight—Passage Money—Mode of calculating Amount recoverable on Policy.

The defendants underwrote for 1000*l.* a policy of marine insurance, expressed to be "upon chartered freight valued at 7000*l.* at and from Sydney to Calcutta and London." The risk was by the terms of the policy to commence from the loading of the said goods or merchandise and to continue until they were safely landed. Upon the arrival of the ship at Calcutta the voyage to England was abandoned in consequence of the failure of the charterers, and the ship was employed for the conveyance of 360 coolies and 1200 bags of rice to the Mauritius. Upon learning this the plaintiff, the assured, procured an alteration of the policy, by the insertion of a memorandum in the margin, altering the voyage and declaring the interest to be on freight valued at 2000*l.* The intention of the plaintiff in effecting this insurance was to insure the freight of the rice only, but this intention was not communicated to the defendants. No binding custom of trade limiting the meaning of the term freight was proved; but the most frequent course in insurance business, where freight of coolies is intended, is to describe it as freight of coolies, or passage money of coolies, or by some other term distinguishing it from freight of merchandise. The rate of premium differs for the insurance of passage money of coolies and freight of goods. The ship was wrecked, and there was a total loss of the rice, and consequently of the freight of the rice, but the coolies, with the exception of twelve, were saved, and their passage money, which was payable on arrival, paid. The plaintiff sued the defendants to recover, as on a total loss, the amount underwritten, being the half of the total value declared

1872

DENOON
v.
HOME
AND COLONIAL
ASSURANCE
COMPANY.

in the policy. The defendants contended that there was only a partial loss, as the freight or passage money of coolies must be taken to be included in the term "freight" used in the policy:—

Held, that the question, whether the term "freight" in a marine policy includes passage money, must depend upon the circumstances of each particular case, and the context of the particular policy; that, in the present case, the term "freight" did not include such passage money, and consequently there was a total loss of the freight insured by the policy; but that inasmuch as the valuation of freight in a valued policy primâ facie refers to a full cargo, or the charter of the entire ship, and there was in this case nothing to shew the underwriter that the valuation was less than such full freight, the valued policy as applicable to a partial cargo must be treated as an open policy for half the loss of freight, not exceeding in any case 1000*l.*

ACTION brought to recover the sum of 1000*l.* on a policy of insurance on freight valued at 2000*l.*

The defendants paid into court the sum of 440*l.* 1*s.*; the plaintiff replied that such sum was not sufficient to satisfy his claim.

The cause came on for trial before Bovill, C.J., at the sittings in London after Michaelmas Term, 1868, when a verdict was taken by consent for the plaintiff for the amount claimed and 40*s.* costs, subject to the following case:—

1. On the 1st of December, 1863, Mr. Frederick Bassel, the then owner of a ship called the *James Nasmith*, afterwards the *Sandringham*, entered into a charterparty with Messrs. Halliday, Fox, & Co., of London, whereby it was agreed that the said ship, which was then on a voyage to Sydney, should proceed from Sydney to Calcutta, and there load a cargo for Liverpool or London at an agreed rate of freight.

2. On or about the 2nd of April, 1864, Mr. William Berry became the owner of the said ship *Sandringham*, and the said Mr. Bassel assigned to him all his interest in the above-mentioned charterparty.

3. On the 5th of April, 1864, Mr. Berry, having become the owner of the said ship *Sandringham*, as before mentioned, mortgaged her to the plaintiff, and also assigned to him all and singular the freights, passage moneys, earnings and gains, profits, sums of money, benefits, and advantages whatsoever made, earned, and gotten, and to be made, earned, and gotten, and to become due and payable by, or by means of, or for or on account of the said ship *Sandringham* and certain other ships, or any of them,

and all and every existing and future charterparties, contracts, and agreements in relation thereto.

4. On the 5th of October, 1864, the plaintiff effected with the defendants a policy of assurance, whereby the sum of 1000*l.* was insured upon chartered freight, valued at 7000*l.*, in the said ship *Sandringham.* A copy of the charterparty is annexed to, and is to form part of this case.

5. The master of the said ship having proceeded on his voyage according to the terms of the above-mentioned charterparty, arrived at Calcutta in November, 1864, and was there informed (as the fact was) that Messrs. Halliday, Fox, & Co., the charterers, had stopped payment, and that their agents at Calcutta refused to have anything to do with the said charterparty or the loading of the said ship, or otherwise employing her.

6. The master of the said ship *Sandringham* thereupon tendered for the conveyance of coolies and rice from Calcutta to Mauritius, and on the 25th of January, 1865, the said ship sailed from Calcutta for Mauritius, having on board 360 coolies and the necessary provisions for their use on the voyage, and 1200 bags of rice. The passage-money of the coolies amounted to 1944*l.*, and was payable on their arrival at Mauritius. The bill of lading freight of the rice amounted to 1412*l.*

7. On the 13th of March, 1865, the plaintiff, through his broker, procured the defendants to alter the said policy and subscribe in the margin thereof, the note or memorandum, a copy of which will be found in the margin of the copy of the said policy annexed to this case, and is to form part of this case.

8. While the ship was proceeding on her voyage from Calcutta towards Mauritius she was stranded when near the latter port, and the ship herself, and the whole of the 1200 bags of rice, and the freight payable in respect thereof were totally lost by perils insured against.

9. The said 360 coolies, with the exception of twelve, were all saved, and arrived at their destination; and the passage money of those who so arrived, amounting to 1879*l.* 4*s.* was duly received by the agents of the ship at Mauritius. Twelve of the coolies were drowned, and the passage money in respect of them was totally lost by perils insured against.

Paragraphs 10 to 13 of the case, related to the circumstances under which the alteration of the policy was effected, and the intention with which the plaintiff procured such alteration. The arbitrator, who stated the case found that if evidence of these matters were admissible, the plaintiff, in procuring the policy to be altered, and the note or memorandum to be subscribed in the margin, intended to insure only the freight of rice, and to exclude from the insurance the passage money of coolies, but this intention was not communicated to the defendants.

13. Evidence was given on the part of the plaintiff before the arbitrator, by whom the case was stated, intended to shew that by the usage and custom of insurance business, the word "freight," simply, when used in a policy of insurance, is confined to freight of merchandise, and does not include passage money of coolies. Evidence to the contrary was given on the other side, and no such usage or custom was proved; but the most frequent course, where passage money of coolies is intended to be insured, is to describe it as freight of coolies, or passage money of coolies, or by some other term distinguishing it from freight of merchandise. The premium for insuring such passage money, upon a voyage from Calcutta to Mauritius, is generally less than the premium for insuring freight of merchandise on the same voyage.

The question for the Court was, whether the plaintiff was entitled to any, and if so, what sum of money beyond the amount paid into court.

The copy policy annexed to the case was, so far as material, as follows: "In consideration of the premises and of the said sum of 52*l.* 10*s.*, the said company promises and agrees with the said A. Denoon, Esq., his executors, administrators, and assigns, that the said company will pay and make good all such losses and damages hereinafter expressed, as may happen to the subject-matter of this policy, and may attach to this policy in respect of the sum of 1000*l.* hereby insured, which insurance is hereby declared to be upon chartered freight valued at 7000*l.* in the ship or vessel called the *Sandringham ;* lost or not lost at and from Sydney to Calcutta and London. And the said company promises and agrees that the insurance aforesaid shall commence upon the freight and goods, or merchandise aforesaid, from the loading of the said goods or merchandise on board the said ship or vessel, at as above, and continue until the said goods or merchandise be discharged and safely landed at as above." Then followed the enumeration of the perils insured against, which were the same as usual in marine policies and other usual clauses.

In the margin of the policy, which was partly in print and partly in writing, was the following memorandum in writing: "It is hereby declared and agreed that the within voyage is from Sydney to Calcutta, and thence to Mauritius, instead of as before stated, and to return 20 per cent. for safe arrival there. The within interest is now declared to be on freight valued at 2000*l.*
13th of March 1865."

Jan. 22. *Pollock, Q.C.* (*Cohen* with him), for the plaintiff. The parties must be taken by the term "freight," as employed in this charter, to have meant freight in the ordinary mercantile understanding of the term, viz. the price of the carriage of an ordinary cargo, i.e. of merchandise, and not the passage-money of coolies. Freight is defined by the text books on maritime law as being the hire of a ship for the carriage of goods: 1 Beawes. Lex Mercatoria, p. 187; Maclachan's Merchant Shipping, p. 380; Maude and Pollock, 3rd ed. p. 268. See also *Lewis* v. *Marshall* (1); *Muller* v. *Gernon* (2); 1 Phillips on Insurance, 5th ed. p. 121, s. 327. In construing the contract of insurance the ordinary meaning of words and that which the parties may be supposed to have in contemplation is to be taken. Duer, vol. i., p. 162, says: "We are not to adopt that meaning to which the etymology of the words or the definitions of lexicographers might alone direct us." To the same effect is Emerigon, c. 1, s. 5.

[BRETT, J. Freight has been considered to cover more than the price of the carriage of goods. An insurance on freight has been held to cover the benefit which the assured (the shipowner) might have derived by carrying his own goods on the voyage insured: *Flint* v. *Flemyng.* (3)]

That decision only contemplated the carriage of goods. The language of the policy itself shews that the parties only intended

---

(1) 7 M. & G. 729. (2) 3 Taunt. 394.
(3) 1 B. & Ad. 45.

1872

DENOON
v.
HOME
AND COLONIAL
ASSURANCE
COMPANY.

freight of goods, for it is provided that the risk shall commence from the loading of the said goods or merchandise. This is not applicable to passage-money.

[He also cited *Forbes* v. *Aspinall.* (1)]

Sir G. Honyman, Q.C. (*J. C. Mathew* with him), for the defendants. The term "freight" includes all benefit which may be derived from the use of the ship. In *Hall* v. *Janson* (2) it was held that the term "freight" must receive a signification that would include any sum paid as the price of the hire of the ship. In Kent's Commentaries, 11th ed. p. 296, s. 219, it is stated that the term "freight" is applied to all rewards or compensation paid for the use of ships, including the transportation of passengers. See also Molloy, book 2, c. 4, s. 8, vol. i. p. 373, 9th ed., where the term "freight" is used of the carriage of slaves; Emerigon, c. 8, s. 8; Roccus, note 2; Arnold on Marine Insurance, 4th ed. pp. 29, 32; *Flint* v. *Flemyng* (3); Abbott, 11th ed. p. 366; *Moffat* v. *East India Co.* (4); *Etches* v. *Aldan* (5); *Clark* v. *Ocean Insurance Co.* (6); *Devaux* v. *I'Anson.* (7)

Pollock, Q.C., in reply.

Cur. adv. vult.

May 28. The judgment of the Court (Willes, Byles, Brett, and Grove, JJ.) was delivered by

WILLES, J. This is an action upon a policy of insurance upon freight on a voyage from Calcutta to Mauritius. As originally filled in, the policy was upon "chartered freight, valued at 7000*l.*, at and from Sydney to Calcutta and London." It was underwritten by the defendants for 1000*l.* The chartered freight mentioned in the policy was upon a charterparty for the carriage of goods only upon a voyage from Sydney to Calcutta and London. Upon the arrival of the ship at Calcutta, the voyage to England was abandoned because of the charterers having stopped payment; and the ship took coolies and rice to Mauritius. To meet this change of voyage, and with the intention of insuring the freight of cargo only

(1) 13 East, 323.

(2) 4 E. & B. 500; 24 L. J. (Q.B.) 177.

(3) 1 B. & Ad. 45, 48.

(4) 10 East, 468.

(5) 1 M. & R. 157.

(6) 16 Pickering, 289.

(7) 5 Bing. N. C. 519.

(2) 1 C Jur N.S. 571

to the extent which the vessel would carry in the space not occupied by the coolies and their provisions,—which intention the plaintiff communicated to his agent, but not to the underwriters,—the plaintiff valued the freight on goods only at 2000*l.*, and procured an alteration of the policy, in effect a new policy, as follows:— "It is hereby declared and agreed that the within policy is from Sydney to Calcutta and thence to Mauritius, instead of as before stated, and to return 20*s.* per cent. for safe arrival there. London, 13th March, 1865. The within interest is now declared to be on freight valued at 2000*l.* 13th March, 1865." The sum underwritten by the defendants remained unaltered, 1000*l.*, or half of the new valuation; the assured being, so far as this underwriter was concerned, his own insurer for the other half.

The vessel proceeded upon the voyage to Calcutta with 360 coolies and their necessary provisions, for which the passage-money of 54 rupees each coolie, payable on arrival at Mauritius, amounted to 1944*l.*, and 1200 bags of rice, the bill of lading freight on which was 1412*l.* Near her destination the vessel was wrecked, and the rice and the freight thereof were wholly lost. 348 of the coolies were saved and reached their destination, and their passage-money, 1879*l.* 4*s.*, was paid. The question is, for what amount the underwriters are answerable.

The plaintiff insists that the passage-money of the coolies ought to be thrown out of consideration, as not being "freight" within the policy, and that he is entitled to recover as for a total loss of the "freight" insured, 1000*l.*

The defendants, on the other hand, insist that the passage-money of the coolies is to be considered as freight insured by the policy, and that the full freight being thus taken, at coolies 1944*l.*, and rice 1412*l.*=3356*l.*, they are bound to pay only the proportion of the partial freight lost, coolies, 64*l.* 16*s.*, rice, 1412*l.*=1476*l.* 16*s.*, which will be produced by the following sum in the rule of three, viz.:—3356*l.*: 1000*l.* : : 1476*l.* 16*s.*: 439*l.* and a fraction; and to cover this claim they have paid a sufficient amount, 440*l.* 1*s.*, into court. Assuming passage-money to be freight within the policy, and included in the valuation, this mode of calculation was not disputed by the plaintiff, and requires no further comment than a reference to the discussion in the second volume of Mr. Willard

1872

DENOON v. HOME AND COLONIAL ASSURANCE COMPANY.

Phillips's highly valuable work on Insurance, § 1203, where the subject is discussed.

The first and chief question therefore is, whether the passage-money of the coolies was freight within the policy, and to be taken in favour of the underwriters as included in the valuation.

Freight, according to the dictionaries, includes, 1. the cargo; 2. the actual transport from one place to another; 3. the hire of the ship or part of it, or the charge for the transport of goods therein. It may by extension include the passengers, or even passage-money; as, for instance, upon a question arising upon the now abandoned maxim that "freight is the mother of wages," or upon a question of sale, or capture, or abandonment, because the passage-money is, equally with the freight of goods, an incident or accessary of the ship. Accordingly, Chancellor Kent, 3 Kent's Com. 219, states that "Freight, in the common acceptation of the term, means the price for the actual transportation of goods by sea from one place to another; but, in its more extensive sense, it is applied to all rewards or compensation paid for the use of ships, including the transportation of passengers;" and he refers to the case of *Giles* v. *The Cynthia* (1), in which the question arose upon a claim to wages. And in *Mulloy* v. *Backer* (2), where the question was whether passage-money or an apportioned part of it became payable in the case of capture on the way, Lawrence, J., said: (3) "Foreign writers considered passage-money the same as freight:" and Lord Ellenborough added, "Except for the purpose of lien, it seems the same thing." It must be added to this exception that, in respect of general average, not only the passengers, but also their provisions, are exempt from the general rule of contribution, not being regarded as merchandise: *Brown* v. *Stapyleton.* (4) Upon a question of constructive total loss, passage-money payable at the port of discharge, so far as it is available, if at all, must be taken into account, as well as freight of goods; but so must general average, according to *Kemp* v. *Halliday* (5); and this consideration is therefore inconclusive.

It is certain that freight is not ordinarily used in marine policies in its most extensive sense as including cargo; and the question in each case must be what under the circumstances and in the context of the particular policy it was intended to express. Until late periods, when, in consequence of increased facility of communication, the passage across the ocean of large bodies of free men as emigrants or otherwise had become so common and important, there was little reason for insuring passage-money, especially as it has been and is in so many cases paid beforehand, so as not to be at the shipowners' risk. The only case in which the question could arise is one like the present, where the earning of passage-money depended upon the arrival of the vessel. Accordingly, it is not surprising that no trace of passage-money being treated as freight for the purpose of insurance is to be found in the reported cases, nor that the policy in common use should be framed with minute reference to circumstances affecting the ship and cargo, and, in terms at least, should make no reference to passengers.

---

(1) 1 Peters' Adm. R. 203, 206.

(2) 5 East, 316.

(3) 5 East, at p. 321.

(4) 4 Bing. 119.

(5) Law Rep. 1 Q. B. 520.

The case of *Flint* v. *Flemyng* (1) was relied on as shewing that "freight" has been extended so as to include the value of the vessel to the owner in carrying his own goods; but this only shews that the freight insured by the policy is not limited to money due upon a contract with a liability of a third person. It decided that "freight" sufficiently represents the interest of the shipowner in the carriage of his own goods, and includes the value of their carriage. That case does not decide that the value to the owner of his being carried as a passenger in his own vessel, or of others being so carried, is freight within an ordinary policy; and it does not, therefore, touch the question whether freight in this policy of insurance includes passage-money.

Evidence was given on both sides to prove a customary use of the word "freight" in the particular trade; but this evidence was insufficient to make out a binding usage either way. It appears, however, that the most frequent course is, to describe passage-money by a distinguishing term, and not merely as freight; and it was proved that, for insurance purposes, there is a distinction between freight and passage-money, because the premium for the latter, upon a voyage from Calcutta to Mauritius, is generally less than that for the former; so that, as a matter of business, the not mentioning the subject upon the occasion of the insurance would indicate that the freight was probably intended to refer to merchandise.

---

(1) 1 B. & Ad. 45.

This distinction is further supported in the case of the present policy by more than one consideration. First, the policy was originally upon "chartered freight," and the charter was for goods only. The change to "freight" in general would, therefore, primâ facie seem to indicate freight of the same kind upon the voyage substituted "instead of as before stated." Secondly, the policy not only generally provides, as do ordinary policies, for ship and goods as the subject-matter under consideration, but provides, in specific terms applicable to the freight of merchandise only, for the time at which the risk is to commence. These terms are as follows:—"*The insurance aforesaid* shall *commence*, upon the *freight* and goods or merchandise aforesaid, *from the loading* of the said goods or merchandise on board the said ship or vessel at as above, and *continue* until the said *goods or merchandise* be discharged and safely landed." This clause obviously has a specific effect upon the freight, because it excludes the application of those cases in which the risk on *freight* has been held to attach upon the goods being ready but not loaded. It therefore helps strongly to indicate the meaning of "freight" in this policy.

In this state of facts, and upon the construction of the policy in question, we adopt the view of the assured, that the freight of merchandise only was assured, according to his intention declared to his agent, and upon which the valuation actually took place; which intention, however, not being communicated to the underwriters, could not of itself have altered the construction of the policy, whatever effect it may have had to shew a mistake on both sides as to the subject-matter of the valuation, and so to open the policy.

The communications, however, of the assured with Berry and with his agent, coupled with the fact of the large number of coolies on board, and the necessary provisions for their sustenance, are clear to shew that the cargo of rice put on board was not a full or substantially a full cargo, and that there was no total loss of "freight," understood as freight of merchandise, to sustain the claim to recover absolutely the 1000*l.* upon the valuation. A valuation of freight refers primâ facie to the freight of a full cargo or the charter of the entire ship; and in this case there was nothing to shew the underwriter that the valuation was of less than such full freight. If there had been no passengers, or so few as not substantially to interfere with the amount of the cargo, and the ship had been fully loaded with as much rice as would fetch a sum equal to the total of freight and passage-money upon the voyage in question, viz., 3356*l.*, and the whole had been lost, the 1000*l.* only would have been payable. If only so many bags of such full cargo had been lost as would produce a freight of 1476*l.* 16*s.*, the defendants' mode of calculation would have been applicable, and they would have been liable to the loss, multiplied by 1000, and divided by 3356, =439 and a fraction.

The diminution of the liability for a partial loss under a valued policy, where the actual value of the total exceeds the valuation, is, however, by an artificial rule, which can only be applied where there is a total with which to establish the proportion. Where no such total is given, the calculation must proceed as upon an open policy, except in respect of the maximum for which the underwriter is answerable and the portion for which he insures. In the present case, assuming that there is a valuation by agreement of the same subject-matter, there is no total of full freight of merchandise with which to institute the proportion. It is not stated, and we must conclude could not be stated with certainty, what the total freight would have been, had the vessel been filled up with cargo, or that there might not possibly have been a full cargo the freight of which would not have exceeded 2000*l.* We must, therefore, whilst, on the one hand, we decide in favour of the assured, that the passage-money of the coolies was not freight within the policy to make up a full freight upon which to work out this proportion; on the other hand, we must hold in favour of the underwriters, that the policy as applicable to a partial cargo was an open policy for half the loss of freight not exceeding in any case 1000*l.*; and, as only 1412*l.* freight was lost, the underwriters are liable for 706*l.*, for which sum, less the 440*l.* 1*s.* paid into court, viz., 265*l.* 19*s.*, the plaintiff is entitled to judgment.

In arriving at this conclusion as to the operation of the policy

1872

DENOON
v.
HOME
AND COLONIAL
ASSURANCE
COMPANY.

in case of the total loss of a partial cargo, we act in accordance with the decision of the Court of King's Bench in *Forbes* v. *Aspinall* (1), as to freight, and that of this Court in *Tobin* v. *Harford* (2), affirmed on error (3), as to goods.

Judgment for the plaintiff.

Attorneys for plaintiff: *Ware & Hawes.*
Attorneys for defendants: *Waltons, Bubb, & Walton.*

May 29.

REPUBLIC OF PERU *v.* WEGUELIN AND OTHERS.

Practice—Inspection of Documents—Costs of—14 & 15 *Vict. c.* 99, *s.* 6—*Common Law Procedure Act*, 1854, *s.* 50.

10 C.P. 227
236

The general rule of practice with regard to the inspection of documents is that the costs of inspection must be paid by the party inspecting, though, *semble*, that, under exceptional circumstances, such costs may be made costs in the cause.

APPLICATION to vary an order made by Hannen, J., at chambers, by directing that the costs of the inspection of documents, instead of being paid by the plaintiffs, the parties inspecting, should be costs in the cause.

It appeared that discovery of documents had been obtained by the plaintiffs, and upon the affidavit of discovery an order had been made by Martin, B., for inspection of documents by the plaintiffs in the usual form, which provides that the parties inspecting shall pay 6*s.* 8*d.* costs, and 4*d.* per folio for copies of documents. The inspection, however, being likely to take longer than usual, it was arranged between the parties that it should be referred to a master to say what costs should be paid for inspection. The master fixed upon the sum of 6*s.* 8*d.* an hour. The plaintiffs thereupon made an application at chambers to amend the order, by making the costs of inspection costs in the cause. Hannen, J., before whom the application came, refused to make the costs costs in the cause, but thought the sum of 6*s.* 8*d.* an hour excessive, and accordingly made an order that the order of Martin, B., should be amended by striking out the words "six and eightpence," the amount to be referred again to the master to decide with reference to the duration and character of the labour and care imposed on defendants' attorney by such inspection. It was now sought by the plaintiffs to vary the order of Hannen, J., as above mentioned.

---

(1) 13 East, 323. (2) 13 C. B. (N.S.) 791; 32 L. J. (C.P.) 134.
(3) 17 C B. (N.S.) 528; 34 L. J. (C.P.) 37. 9 Jur NS 992

A rule nisi having been obtained accordingly,

R. G. Williams shewed cause. The general rule is that the costs of inspection are to be borne by the party inspecting: *Hill* v. *Philp* (1); *Stilwell* v. *Ruck.* (2) Two judges at chambers have, in the exercise of their discretion, come to the conclusion that there are no circumstances in the present case to take it out of the general rule. [He also cited Day's Common Law Procedure Acts, 237, 3rd ed., and Gray on Costs, 364.]

Watkin Williams and *Cohen* supported the rule. The case of *Hill* v. *Philp* (1) was decided on the 14 & 15 Vict. c. 99, s. 6. This order for inspection was made under a different statute, viz. the 50th section of the Common Law Procedure Act, 1854, which, upon discovery, gives a judge power to make such further order as may be just under the circumstances. It has always been considered that this section gives power to order inspection, and it is clear that the order may make the costs costs in the cause. To lay it down as a general rule that the costs of inspection of documents are always to be paid by the party inspecting, is to encourage the other party to render the inspection as long and troublesome as possible. Inspection is really in the nature of a proceeding in the cause, and the tendency ought to be to give the successful party all costs reasonably incurred in the course of the action.

[They argued that the number and character of the documents to be inspected were such as to make the case one of an exceptional character, as to which the general rule as to costs of inspection was inapplicable. They also cited Day's Common Law Procedure Acts, 234, 3rd ed., and *Daniel* v. *Bond.* (3)]

BOVILL, C. J. It appears to me that the provisions of the Act for the amendment of the Law of Evidence (14 & 15 Vict. c. 99, s. 6) were not superseded by the 50th section of the Common Law Procedure Act, 1854. Both the enactments must be taken together, and they enable the Court to make such order as the justice of the case may demand with respect to discovery and inspection. There is nothing in the form of this order to shew that it was made under the one rather than the other of these enactments. I can see no reason why it should not be treated as made under the 6th section of 14 & 15 Vict. c. 99. The question arises whether there is a general rule as to costs with respect to inspection of documents. Shortly after the passing of the 14 & 15 Vict. c. 99, the question as to costs of inspection arose in the case of *Hill* v. *Philp*. (1) The Court of Exchequer took time to consider, and came to the conclusion that the rule should be that the costs of inspection should be paid by the party applying for inspection. That was laid down as the general rule on the subject, and the practice of the courts appears to have been so far settled in conformity with the rule so laid down that the printed form of order employed in this court provides for costs in accordance with such rule. The master also reports that such is the settled practice of the court, and, so far as I am aware, such is also the practice of the other courts. Under these circumstances I do not think this Court can now lay down a fresh rule on the subject. I quite agree that, under the Common Law Procedure Act, 1854, s. 50, the Court or a judge may make such further order as may be just under the circumstances of the case; but the question is, what is to be the general rule, subject to exceptions with regard to extraordinary cases, which may be provided for under the latter part of the 50th section of the Common Law Procedure Act, 1854. The rule is what I have stated, and appears to have been acted on by the judges who made the orders with respect to inspection in this case. Assuming that the judge has a discretion, under the latter part of the 50th section of the Common Law Procedure Act, 1854, with regard to exceptional cases, my Brother Hannen clearly exercised his discretion as to these costs, and he has treated the case as falling within the general rule on the subject laid down in *Hill* v. *Philp* (1), and not as an exceptional case requiring any deviation from such rule. That being so, the party desiring to vary his order must satisfy us that his discretion has been wrongly exercised. I do not think it has been shewn that this was the case here. If any case should arise of a vexatious character, I think the Court would have power to deal with it, and provide against an abuse of the general rule. If circumstances of an exceptional nature were shewn the judge might have a discretion, and might say that the costs should be costs in the cause or of one party in any event, or make such other order as might be just under the circumstances; but in the absence of any facts of an extraordinary nature the general rule must apply. It is laid down in every book of practice to which I have referred, and has been too long established to be lightly departed from.

---

(1) 7 Ex. 232; 21 L. J. (Ex.) 82.

(2) 4 H. & N. 468.

(3) 9 C. B. (N.S.) 716.

---

(1) 7 Ex. 232; 21 L. J. (Ex.) 82.

For these reasons I think this rule must be discharged with costs.

Byles, J. I am of the same opinion. According to the authorities, the general rule is that the party seeking inspection must pay the costs of the inspection. The master states that such is the practice, and the printed form of order is in conformity with his statement. The cases of *Hill* v. *Philp* (1), and *Stillwell* v. *Ruck* (2), distinctly lay down this rule, and it has the very high authority of Gray on Costs, p. 364, in its favour. This Court cannot legislate on the matter, and if alteration be necessary it can only be effected by a rule made by the judges.

Brett, J. I think that the only order to be considered in the present case is that of Hannen, J., and that it must be taken that he made this order in accordance with what he conceived to be the general rule of practice on the subject. The questions, therefore, arise, first, whether there is any such general rule; secondly, whether there are any exceptions to it; and thirdly, whether if there be, this case is one of them. The plaintiffs' counsel appeared to me to contend that there was no such general rule, and that the reason given by Mr. Gray for such a rule was not well founded. If we had been at liberty to consider this case unbound by authority, I should be inclined to say that it is not a correct mode of stating the case to say that inspection is merely a mode of qualifying witnesses to give evidence, and that it is not right to say that it is not a proceeding in the cause. If there were no authorities on the subject I should be inclined to say that the costs of inspection should have been treated on the footing that inspection was such a proceeding. But there is the authority of the case of *Hill* v. *Philp.* (1) That case was no doubt decided before the Common Law Procedure Act, 1854, upon 14 & 15 Vict. c. 99, s. 6, but the Court of Exchequer undertook to lay down a general rule. That ruling has never been questioned in court, and, as we are informed, has been so far adopted at chambers in all the courts as to have been embodied in the printed form of the order for inspection. It has been argued that the practice under the 14 & 15 Vict. c. 99, s. 6, is not applicable, because the order is made under the 50th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). Considering what is stated to have been said by Willes, J., on this subject (2) I have great hesitation in coming to the conclusion at which I have arrived, but I am bound to say that it seems to me that this contention is erroneous. By the 14 & 15 Vict. c. 99, two things were provided for, the one in effect if not expressly a power of discovery, and the other a power of inspection. It was supposed that before the statute the power of the Courts of law as to discovery was not so large as that exercised by the Courts of equity (see *Hunt* v. *Hewitt* (3)), or, at any rate, different in its character. The case of *Daniel* v. *Bond* (4) is an authority to shew that the power of discovery was enlarged by the Common Law Procedure Act. I cannot, however, see that the power of inspection given by the 14 & 15 Vict. c. 99, was not of the largest kind, or that it required enlarging. When, therefore, the power of discovery was enlarged it would seem to me that the power of ordering inspection became applicable to such enlarged power of discovery. I doubt whether the words at the end of s. 50 of the Common Law Procedure Act, 1854, could give the power of ordering inspection if the former section were not in existence. I rather incline to adopt Mr. Day's view (5), that the 50th section

---

(1) 7 Ex. 232; 21 L. J. (Ex.) 82.

(2) 4 H. & N. 468.

(1) 7 Ex. 232; 21 L. J. (Ex.) 82.

(2) It was stated during the argument that Willes, J. had, on the motion for the rule nisi, expressed an opinion that since the Common Law Procedure Act, 1854, the costs of inspection ought to be costs in the cause.

(3) 7 Ex. 236; 21 L. J. (Ex.) 210.

(4) 9 C. B. (N.S.) 716.

(5) Day's Common Law Procedure Act, 3rd ed. p. 250.

was intended to be merely in aid of the 14 & 15 Vict. c. 99, s. 6, and not to supersede it, and that orders for inspection, if made partly under the later Act, are still made also under the former one. No general difference appears to have been made in the practice as to inspection since the Common Law Procedure Act, as is shewn by the printed form of order for inspection employed. That being so, it must be taken, as it seems to me, that the same general rule applies to the order, even if made under the 50th section of the Common Law Procedure Act, 1854. There would be great difficulty, if the practice varied according as the order was made under one section or the other, and if the rule laid down in *Hill* v. *Philp* (1) were to be held to apply to one case and not the other. I think, therefore, that there still is, until it be altered by an agreement between all the judges, which, with my view of the case unfettered by authority, I think might be a matter well worthy of consideration, this general rule, and that it applies to the present case. I think, however, that even under the former statute there must have been exceptions to the general rule, and that it could not have been an absolutely hard and fast rule. At any rate, I think the latter part of the 50th section of the Common Law Procedure Act gives a discretion to the judge in exceptional cases. The judge, however, treated the present case as one within the general rule, and not as an exceptional case. The plaintiffs' counsel have not succeeded to my satisfaction in shewing that he was wrong in his view of the case. I am, therefore, also of opinion that the rule should be discharged.

Rule discharged.

Plaintiffs' attorneys: *Freshfields.*

Defendants' attorney: *H. P. Sharpe.*

---

(1) 7 Ex. 232; 21 L. J. (Ex.) 82.

1872
June 5.

JENKINS *v.* FEREDAY.

Attorney—Costs—Action brought without Authority—Bankruptcy Act, 1869 (32 & 33 *Vict.* c. 71), *s.* 49—*Liability incurred by means of a Fraud.*

An attorney, having brought an action without any authority to do so from the plaintiff, was ordered to pay the defendant's costs of the action:—

Held, that his liability to pay such costs was a liability incurred by means of a fraud within the 49th section of the Bankruptcy Act, 1869.

In this case a rule had been made absolute on the 29th of January, 1872, that all proceedings in the action should be stayed, and the attorney for the plaintiff should pay the defendant's costs, and indemnify the plaintiff against the same, and also pay the plaintiff's and defendant's costs of the application to the Court, to be taxed by the master, on the ground that such attorney had brought the action without the knowledge or consent of the plaintiff, or any authority from the plaintiff to do so.

On the 9th of May the master made his allocatur for 30*l.* costs.

On the previous 22nd of February the attorney presented a petition in bankruptcy for liquidation by arrangement. Meetings of creditors were held, and at the last meeting a resolution was passed, which was afterwards duly registered, to accept a composition of 2*s.* 6*d.* in the 1*l.* upon the amount of the liabilities of the debtor. An estimate was made under the 31st section of the Bankruptcy Act (32 & 33 Vict. c. 71), of the amount of the costs to become due under the before-mentioned rule, and the name of the defendant's trustee in bankruptcy (the defendant having in the interim become bankrupt) was inserted among the number of the creditors for the amount of such estimate.

A rule nisi having been obtained on behalf of the attorney calling on the defendant and the trustee of his estate to shew cause why, on payment to the trustee of the defendant's estate of the amount of the composition payable under the resolution of creditors on a sum of 30*l.*, all further proceedings should not be stayed upon the rule for payment of the costs.

Kenealy, Q.C., shewed cause. This was not such a liability as is included within the 31st section of the Bankruptcy Act, 1869.

The 4th subsection of the 4th section of the Debtors' Act, 1869 (32 & 33 Vict. c. 62), is strong to shew this. By the provisions of that section, cases of default by an attorney in payment of costs, when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the sum in his character of an officer of the court making the order, are excepted from the enactment abolishing imprisonment for debt. Moreover, this case is clearly within the 49th section of the Bankruptcy Act, 1869, which enacts that the order of discharge shall not apply to debts incurred by means of any fraud.

Pearce supported the rule. The 4th section of the Debtors' Act, 1869, does not apply to bankruptcy. The liability to these costs would be clearly proveable under bankruptcy proceedings by virtue of the provisions of the 31st section of the Bankruptcy Act. The widest definition of "liability" is given by the section. This was not a case of a liability incurred by "fraud" under the 49th section of the Act. Bringing an action without authority cannot be said to be a fraud. [He cited *Cary* v. *Dawson.* (1)]

BOVILL, C.J. I am clearly of opinion that the liability to pay these costs comes within the 4th subsection of the 4th section of the Debtors' Act. This is a default by an attorney in payment of costs, when ordered to pay costs in his character of an officer of the court. Therefore the attorney would not be exempted under that Act from imprisonment upon an attachment for non-compliance with the order. Whether, however, the provisions of that section would apply if the liability were one of such a nature as to be discharged under the Bankruptcy Act, 1869, it is unnecessary to determine. This is no doubt a liability or debt for some purposes, but assuming it to be one proveable under a bankruptcy within s. 31 of the Act, yet it seems to me clear that it comes within the 49th section of the Bankruptcy Act, as being a debt incurred by means of a fraud. I think an order of discharge in bankruptcy does not discharge from such a liability as the present, because the party incurring it was guilty of fraud within the section.

I am therefore of opinion that this rule should be discharged with costs.

(1) Law Rep. 4 Q. B. 568.

1872

JENKINS
v.
FEREDAY.

BYLES, J., concurred.

BRETT, J. It seems to me that it is not necessary to decide whether this is a debt or liability of such a nature as to be proveable under the Bankruptcy Act, 1869, because, even if it is, it appears to me to be clearly a liability incurred by means of a fraud under the 49th section of the Act. I am decidedly of opinion that for an attorney to bring an action when he knows that he has no authority to do so is a gross fraud.

Rule discharged with costs.

Attorney for applicant: *Earle.*
Attorney for defendant's trustee: *Fereday.*

June 18.

GRIMWOOD AND ANOTHER v. MOSS.

Landlord and Tenant—Ejectment—Forfeiture—Distress for Rent—Waiver.

10 Ch D 758
22 Ch D 416
421

A lease of a farm contained a condition of re-entry for breaches of covenants. Breaches of covenants took place before the 24th of June, 1871. The lessors brought ejectment against the tenant on the 21st of July, 1871; but the writ did not claim possession as from any antecedent date. After the commencement of the action, but before trial, the lessors distrained for rent due up to the 24th of June, 1871:—

Held, that by such distress they had not precluded themselves from relying at the trial on any breach of covenant before the 24th of June, 1871, on the ground that by bringing ejectment they had unequivocally declared their election to determine the lease on any ground of forfeiture which had not been waived before the commencement of the action, and that the subsequent distress, if not justifiable under the 8 Anne c. 14, which enables the landlord under certain circumstances to distrain after the determination of the tenancy, was a trespass.

ACTION of ejectment, brought to recover possession of a farm called the Wicks Manor Farm, in Essex. The case was tried at the Essex Spring Assizes before Hannen, J., when the facts, so far as material to the present report, appeared to be as follows: The plaintiffs were the lessors and the defendant the assignee of the lease of the farm in question. The lease contained a condition of re-entry for non-performance of the covenants.

The action was brought to recover possession of the farm, in respect of various alleged breaches of covenant. It was not denied that certain breaches of the covenants took place previous to the 24th of June, 1871.

Another breach relied on was the breach of a covenant not to take two white straw crops from the arable lands in any two successive years, without the consent of the lessors. It was disputed by the defendant that there was anything which amounted to a breach of this covenant; but such breach, if any, was subsequent to the 24th of June, 1871. It became unnecessary in the view which the Court took, to decide whether what had taken place amounted to a breach of this covenant, as they held the plaintiff entitled to recover in respect of the breaches prior to the 24th of June, 1871.

The writ in the action was dated the 21st of July, 1871, and did not claim the premises as from any previous day. In September, 1871, the lessors distrained for rent due up to the previous 24th of June. Particulars of breaches were not applied for or delivered to the defendant until October, 1871.

The learned judge directed the verdict to be entered for the plaintiffs, reserving leave to the defendant to move to enter it for himself on the ground that the distress waived the breaches of covenant prior to the 24th of June, 1871.

A rule nisi having been obtained accordingly,

Denman, Q.C., and *Dixon*, shewed cause. It will be contended that the distress for rent due up to the 24th of June, 1871, waived the right of re-entry for breaches of covenant before that date. But *Jones* v. *Carter* (1) is directly in point. It is there laid down that a receipt of rent after the lessor has by some unequivocal act, such as bringing ejectment, expressed his election to treat the lease as void, cannot operate to revive it. It is contended by the defendant that the writ not claiming as from any antecedent date, is only a disaffirmance of a tenancy at the date of the writ; but the act of bringing ejectment unequivocally declares the intention of the landlord to determine the tenancy and to treat the tenant as a trespasser from the earliest period at which the landlord can substantiate his right of re-entry. The waiver, where there is one, is not of the breach of covenant, but of the right of

(1) 15 M. & W. 718.

1872

GRIMWOOD v. MOSS.

re-entry. There cannot be, when once ejectment is brought, a waiver of the right of re-entry, for the bringing of the action is equivalent to a re-entry, and the landlord who has once entered is entitled to refer his re-entry to any ground which entitled him to make such re-entry. Anything done subsequent to the bringing of the action cannot affect the election once made. The cases of *Doe* v. *Meux* (1), *Dendy* v. *Nicholl* (2), and *Bridges* v. *Smyth* (3), are all conclusive authorities on the subject.

Garth, Q.C., and *Shaw*, supported the rule. The bringing of the action of ejectment only conclusively disaffirmed the tenancy as from the 21st of July, 1871, the date of the writ, no previous date being mentioned in the writ as that at which the title to possession accrued. The tenant is left in complete ignorance of what is relied on as the determination of the tenancy; it may be a breach subsequent to the 24th of June. The act of bringing the ejectment, therefore, cannot be an unequivocal expression of an intention to disaffirm the tenancy from any date previous to the 21st of July. Then the landlord distrains for rent due up to the 24th of June. That distress is an unequivocal affirmance of the existence of a tenancy up to that date. It acts as a waiver of all breaches previous to the 24th of June, and none such can be relied upon at the trial. The effect is, that unless a breach can be shewn between the 24th of June and the 21st of July, the plaintiff must fail. It would be a great hardship if the landlord could have the right of blowing hot and cold, of affirming the tenancy for one purpose, and disaffirming it for another. The first and only unequivocal act done by him with relation to the existence of a tenancy on the 24th of June is one affirming its existence. The writ gave no notice of any election to disaffirm it at that date.

[WILLES, J. The distress may be a trespass, unless it can be brought within the terms of the statute of Anne, giving the landlord a right to distrain after the determination of the tenancy.]

The tenant could not, in such a case as the present, practically resist it. He could not know from what period the landlord claimed to disaffirm the tenancy.

[WILLES, J. He may apply for particulars. I have always understood that a distress affirmed a tenancy at the time of the distress, not only at the time when the rent accrued due. If so, it is clear that the election being once determined by the bringing of the action of ejectment, the distress can make no difference.]

---

(1) 1 C. & P. 346.

(2) 4 C. B. (N.S.) 376; 27 L. J. (C.P.) 220.

(3) 5 Bing. 410.

Suppose there were three breaches of covenant—on the 1st of January, the 1st of March, and the 1st of July; what is there then to prevent the landlord from releasing the first two by deed, and relying on the last? Similarly, why should he not, by his act, estop himself from relying on the former breaches? [They cited Notes to *Dumpor's Case* (1); *Dendy* v. *Nicholl* (2); *Croft* v. *Lumley*. (3)]

WILLES, J. I am of opinion that this rule should be discharged. This was an action of ejectment brought, not on the general title by a party between whom and the defendant no relationship existed, but by an admitted landlord against a tenant upon the ground of the existence of a state of things entitling the landlord to re-enter, notwithstanding the demise. The lease contained certain covenants and a condition of re-entry for breach of those covenants; and certain breaches of those covenants had undoubtedly taken place previous to the 24th of June, 1871. The action of ejectment is certainly so far anomalous and exceptional in its character, that no statement of title or ground for the claim to the premises sought to be recovered is set forth. The action is one to try the right of possession only; and there are inconveniences which might arise if it were always necessary to set out the title. The plaintiff may be entitled to recover by reason of previous possession; the party in possession being by law entitled to retain possession until dispossessed by some one having a better title. In such a case it would frequently be difficult to give a description of the title. It was therefore considered, when the Common Law Procedure Act was framed, that having regard to cases where such difficulties might arise, and especially to the case of landlord and tenant, it was better not to provide for any statement of title which, by reason of its specific character, might endanger the right of a person entitled to recover. But in such a case as the present,

---

(1) 1 Sm. L. C. 6th ed. 30. (2) 4 C. B. (N.S.) 376; 27 L. J. (C.P.) 220.
(3) 5 E. & B. 648; 27 L. J. (Q.B.) 321. 6 H.L.C. 672
4 Jur N.S. 903. 7 Jur N.S. 63

1872

GRIMWOOD v. MOSS.

although the writ does not express the action to be brought for any specific breach of covenant, it is clear that the action is not brought on an alleged title paramount, but by reason of the relation between the parties, to recover the premises in respect of any breach of covenant for which the landlord may have a right to re-enter. The law does not insist on any count in which the title is set forth, nor on any particulars of breaches unless the defendant demands them; but if he demands such particulars, he can obtain them after appearance, and in some cases even before. Until, however, he applies for such particulars, the cause of action is at large, and the action is to be considered as brought in respect of the landlord's right to re-enter for any previous breach of covenant which can be proved.

Such right of re-entry, as in the cases to which the doctrine of remitter applies, is referred back to the earliest period at which a good title could be made, viz. to the first breach in respect of which the right to re-enter arose, and which has not been waived. This doctrine is laid down as the law in the case of *Jones* v. *Carter* (1) by Lord Wensleydale, without any reference to the existence of particulars of demand, in the clearest and most satisfactory manner. I am not prepared to be the first to shake or fritter away the authority of that case. I entirely agree that the true principle upon which that decision was founded was, that the bringing of the action of ejectment is equivalent to the ancient entry. It is an act unequivocal in the sense that it asserts the right of possession upon every ground that may turn out to be available to the party claiming to re-enter. In the case of *Dr. Grenville* v. *The College of Physicians* (2) Lord Holt laid it down that a person doing a lawful act was not bound by the ground he alleged for doing it, but might justify it on any ground that existed in fact. The act of entry is one of those acts in pais mentioned in the judgment in the case of *Lyon* v. *Reed* (3), which bind parties by way of estoppel, as being acts of notoriety not less formal and solemn than the execution of a deed.

It is quite clear if the landlord, instead of bringing ejectment, had entered, he could have justified in an action of trespass by reference to any act of forfeiture which he could prove. In my opinion the subsequent distress can make no difference. If the landlord had entered, a distress on the goods of the tenant would not have defeated the effect of his entry. Apart from any statute, it would be a simple act of trespass; and whether it be justified by the statute of Anne, or not, is immaterial. My impression is, that it would be unlawful, for the reason suggested by Patteson, J., in the case of *Doe* v. *Williams* (1), at nisi prius, viz., that the statute only applies to the case of the determination of the tenancy in the ordinary course, and not by a forfeiture. But even assuming that the distress were valid, it could make no difference, for it would be valid, not by reason of any continuance of the lease (the landlord having determined that by entry for the forfeiture), but only by virtue of a statute giving the right of distress within a certain period after the determination of the lease. Therefore the whole case comes to this: there is an action, the bringing of which is equivalent to an entry for the forfeiture, which determines the term, followed by a distress, which is either a trespass for which the defendant has his remedy, or, if valid, does not involve any continuance of the term, but is so by reason of a statute which entitles the landlord to distrain after the term is determined.

---

(1) 15 M. & W. 718.

(2) 12 Mod. 386.

(3) 13 M. & W. at p. 309.

BYLES, J. At first I was disposed to doubt whether the distress was not an admission of the existence of a tenancy on the 24th of June; but my doubts are now removed, and I entirely concur in the judgment of my Brother Willes.

KEATING, J. I also concur. The bringing of the action of the 21st of July was an unequivocal election to treat the tenant as a trespasser, and the effect of it could not be varied by anything that subsequently took place. Taking the distress afterwards could not affirm the tenancy and waive the breaches prior to the 24th of June, in respect of which the election to determine the tenancy had been irrevocably made.

Rule discharged.

Attorney for plaintiff: *E. Bromley, for Veley & Cannington.*
Attorney for defendant: *Woodard.*

---

(1) 7 C. & P. 322.

1872
June 19.

PEGGE *v.* THE GUARDIANS OF THE LAMPETER UNION.

Pauper Criminal Lunatic—Obligation of Guardians to maintain in Asylum—3 & 4 Vict. c. 54, s. 2—Parol Contract for Maintenance of Lunatic.

The 2nd section of the 3 & 4 Vict. c. 54 provides that, in the case of a pauper criminal lunatic removed to an asylum, an order of justices may be made on the guardians of the union comprising the parish of the lunatic's settlement to pay a weekly sum for the maintenance of such lunatic in the asylum:—

Held, that this section imposing on the guardians the duty of paying for the maintenance of such lunatic, it is competent for them to waive the provision requiring an order of justices, and agree to pay a weekly sum for the maintenance of the lunatic without any order.

A criminal lunatic having been removed to a private asylum under a warrant of the Secretary of State in pursuance of 3 & 4 Vict. c. 54, the guardians of the L. union, to which the lunatic was chargeable, paid to the proprietor of such asylum the sum of 16*s.* a week for the maintenance of the lunatic for fourteen years, though it did not appear that any order of justices was ever made against them:—

Held, that under these circumstances, inasmuch as the proprietor of the asylum was bound to keep the lunatic until removed from his custody in due course of law, it might be inferred that the guardians had, before the lunatic was received into the asylum, without an order of justices, entered into an agreement with the proprietor to pay the sum of 16*s.* a week for the maintenance of the lunatic in the asylum until she was removed thence, and that they could not withdraw from such agreement.

Revd in Ex Ch LR 9 CP 373.

Declaration for money payable by the defendants to the plaintiff for care, board, lodging, attendance, and maintenance, bestowed and supplied by the plaintiff on and to Mary Hughes, a criminal lunatic, at the request of the defendants, for money paid, and money found due on accounts stated.

Pleas: 1. Except as to 21*l.* 12*s.* 3*d.*, parcel of the amount claimed, never indebted; as to the said sum of 21*l.* 12*s.* 3*d.* payment into court.

Issue.

The action was tried before Bramwell, B., at the Bristol Spring Assizes, when the facts appeared to be as follows: The action was brought by the plaintiff, the owner of a private lunatic asylum called the Vernon House Lunatic Asylum, to recover in respect of the maintenance and care of one Mary Hughes, a criminal lunatic, from the 25th of March, 1871, to the 24th of December, 1871, at the rate of 16*s.* a week. The lunatic was accused of the murder of three of her children, but being found insane on arraignment, was ordered to be detained during Her Majesty's pleasure, and was ultimately removed to the plaintiff's asylum under a warrant of Sir George Grey, one of Her Majesty's principal secretaries of state, dated the 16th of October, 1856. Such warrant recited that the lunatic had been ordered by a warrant of the Right Honourable Viscount Palmerston to be removed to the Amroth Castle Lunatic Asylum, in the county of Pembroke, and that application had been made to Sir George Grey to order her removal thence to the Vernon House Lunatic Asylum at Briton Ferry, in the county of Glamorgan, and in pursuance of the Act of the 3 & 4 Vict. c. 54, for making further provision for the confinement and maintenance of insane prisoners, authorized and required the superintendent of the Vernon House Lunatic Asylum to receive the lunatic and keep her in custody in the said Vernon House Lunatic Asylum, there to remain until further order should be made therein. On the 19th of October, 1856, the lunatic was received at the Vernon House Asylum, and had remained there ever since. Down to the autumn of 1869 the guardians of the Lampeter Union, to which the lunatic was chargeable, regularly paid for her board and maintenance, &c., the sum of 16*s.* a week. But on the 19th of October, 1869, they directed their clerk to write to the plaintiff and inform him that they would not any longer pay at the rate of 16*s.* a week, but would only pay 11*s.* 1*d.* a week, such being the rate they paid for the maintenance, &c., of lunatics at the Joint Counties Asylum at Carmarthen. The plaintiff refused to agree to the deduction. The lunatic remained at the asylum, and the guardians refusing to pay the amount of 16*s.* a week, the present action was brought. It was not denied at the trial that the charge of 16*s.* a week was a reasonable charge. The amount paid into court was the amount of 11*s.* 1*d.* a week for each of the weeks of the period in respect of which the action was brought. On these facts the learned judge directed a verdict for the defendants, reserving leave to the plaintiff to move to enter the verdict for himself for the amount of 9*l.* 14*s.* 1*d.* being the amount by which the charge for the lunatic's maintenance calculated at the rate of 16*s.* a week would exceed the charge if calculated at 11*s.* 1*d.* a week, on the ground that the facts disclosed ample evidence of a contract by the defendants to pay a reasonable sum to the plaintiff for the maintenance of the lunatic until she was legally discharged from his custody, the Court to be at liberty to draw inferences of fact.

A rule nisi had been obtained accordingly.

Kingdon, Q.C., and *Kinglake*, shewed cause. There is no evidence of a contract to pay 16*s*. a week for the care of this lunatic, for the guardians expressly declined to pay that amount.

[WILLES, J. Is not the person receiving the charge of the lunatic a constable pro hâc vice, and if the plaintiff could not get rid of the lunatic, but was obliged under the warrant to keep her in his custody until removed by due course of law, did not the original arrangement, which it may well be inferred from the facts was entered into between the guardians and the plaintiff, continue ?]

It seems to have been the opinion of Blackburn, J., in *Bradford Union* v. *Clerk of the Peace for Wilts* (1) that the proprietor of the asylum must keep the lunatic until removed by warrant elsewhere. That is, however, no reason for inferring any continuing arrangement, for a remedy is given by the statute 3 & 4 Vict. c. 54, s. 2, under which the lunatic was sent to the asylum. If the guardians refused any longer to pay the 16*s*. a week, the plaintiff could have gone before the justices and obtained an order on the guardians to pay for the maintenance of the lunatic; but a contract cannot be implied which the guardians expressly repudiated by their letters.

[WILLES, J. The way the case may be put is, that there was originally a contract to pay the 16*s*. a week as long as the lunatic was not removed from the asylum, where the consideration would be continuing, and the promisor could not withdraw from the contract, as in the case of *Shadwell* v. *Shadwell* (2), where an uncle agreed to pay an annuity to his nephew if he married a certain lady.]

It would be a strong thing to hold that there was a contract in 1856 to bind all successive guardians. First, such a contract must be under seal; and, secondly, the guardians have no power by

(1) Law Rep. 3 Q. B. 604. (2) 9 C. B. (N.S.) 159; 30 L. J. (C.P.) 145.

5 Jur NS. 1410

the statutes regulating the performance of their duties to enter into such a contract. The effect of the case of *Nicholson* v. *Bradfield Union* (1), which is one of the latest decisions on the subject of the necessity for a contract under seal is, that the seal is dispensed with only where the contract is within the scope of the ordinary purposes of incorporation, and necessarily incident to such purposes, or where the benefit of the contract has been adopted. No power is given by the statutes relating to the incorporation of guardians to make any contract for the maintenance of pauper lunatics. The only mode of dealing with such cases is by obtaining an order under the 2nd section of the 3 & 4 Vict. c. 54. [They also cited *Saunders* v. *St. Neot's Union.* (2)]

Henry James, Q.C., and *Pinder*, in support of the rule, were not called upon.

WILLES, J. This case appears to me to turn upon the effect of the 3 & 4 Vict. c. 54. By that statute, in the event of a person in custody charged with the commission of an offence appearing to be insane, an order may be made to send such person to a lunatic asylum, to be there detained, and in the event of a certificate being given, that he or she has become of sound mind, a warrant is to be issued by the secretary of state, directing that such person shall be moved back to gaol to be there kept, unless the period of imprisonment have previously expired, when he or she is to be discharged. The secretary of state has power under this Act to order persons, in such cases as the present, to be removed to a private lunatic asylum, inasmuch as such an asylum would come within the words "proper receptacle for insane prisoners." Of course, in general, the secretary of state would, if informed that the lunatic was a pauper, and if there were a public asylum to which the guardians contributed, conveniently situated, send the lunatic to such public asylum, but if there was no such asylum convenient, or the secretary of state had no evidence before him that the lunatic was a pauper, he might send the lunatic to a private asylum. It is obviously necessary to provide for the maintenance of persons so sent to a private asylum. That is done by the 2nd section of the Act. I do not wish to be supposed to say that the proprietor of a private lunatic asylum is to be bound to receive the person under the warrant against his will; it is unnecessary to say anything about that question, but having once received the lunatic he has received a prisoner whom he is bound to keep safely until such prisoner is removed from his custody by due course of law. The 2nd section provides for the maintenance of the lunatic if, from such lunatic's pecuniary circumstances no other means are available for his or her support.

---

(1) Law Rep. 1 Q. B. 620.

(2) 8 Q. B. 810.

In this case I think the inference must be drawn that this person was a pauper, inasmuch as she was in fact maintained by the union for about fourteen years. The 2nd section provides in such cases that the justices may order the guardians to pay all reasonable charges for inquiring into such person's sanity, and conveying him or her to the asylum, and to pay such weekly sums as they, or any two justices, shall by writing under their hands, from time to time, direct for his or her maintenance in the asylum. This is the machinery given by which the liability of the guardians is to be enforced. The substantial effect, however, of the section, besides giving such machinery, is to affirm the liability of the guardians to provide for the maintenance of the pauper in such a case. It was therefore necessary for the defendants, in the ordinary course of their duties as guardians, to maintain this pauper, and to enter into a contract for the purpose. They might waive the benefit of the provisions of the 2nd section which are meant for their protection, on the general principle that a person may waive the benefit of provisions existing merely for his own protection or benefit, and might submit to the liability to maintain the lunatic without the expense or trouble of an order of justices. They need not insist on the preliminary inquiry into the question whether the woman is a pauper chargeable to them, if they be prepared to admit such to be the case. With respect to the expenses the justices might in their discretion fix upon the amount which seemed to them reasonable, but it was competent to the guardians to ascertain for themselves what was reasonable, and waive the exercise of the justices' discretion as to that. The necessary conclusion, from the fact of the guardians having for so many years paid 16s. a week for the maintenance of the lunatic, in good sense is that either an order of justices must have been originally made for that amount and never varied, or that there was some agreement to which the guardians for the time being were parties, that if Pegge would receive the lunatic they would pay either 16*s.* a week or a reasonable sum, which that amount is found to be; and then if he were bound, having received the lunatic, to keep her, in which view I am confirmed by the opinion expressed by Blackburn, J., the guardians could not withdraw from the agreement that was made with reference to a continuous state of things, and cut down his remuneration to an unreasonable, not to say stingy, allowance. Such an agreement would be like that in the case of *Shadwell* v. *Shadwell* (1), where an uncle, in consideration that his nephew would marry a certain lady, agreed to pay him an annuity, or the case where a man has agreed to pay an annuity to a woman in consideration that she would support a child. (2) For these reasons I am of opinion that the rule should be made absolute.

BYLES, J. I am of the same opinion. I think there was clearly in point of fact, in the first instance, a contract to pay the 16*s.* a week for the maintenance of the lunatic. It was within the statutory powers of the guardians, as it appears to me, to enter into such a contract, and the defendants could not refuse to pay the stipulated remuneration to the plaintiff, the lunatic not being removed from his asylum.

It therefore seems to me that there is no answer to this action.

KEATING, J. I am of the same opinion. It seems probable that at the commencement there must have been some arrangement between the guardians and the plaintiff. We must, I think, make the not very violent presumption that either an order of justices for the maintenance of the lunatic was actually made, or that there was a dispensation from the necessity of obtaining such order. Perhaps the more probable view is, that the guardians, being satisfied that the charge of the maintenance of the lunatic must fall on them, arranged to pay without an order either 16*s.* a week or a reasonable sum, which it was admitted 16*s.* was. The

---

(1) 9 C. B. (N.S.) 159; 30 L. J. (C.P.) 145. 7 Jur. N.S. [illegible]

(2) *Jennings* v. *Brown*, 9 M. & W. 496; *Smith* v. *Roche*, 6 C. B. (N.S.) 223; 28 L. J. (C.P.) 237.

1872

PEGGE
v.
LAMPETER
UNION.

only question, then, is whether they were competent to make the arrangement, which it is a fair inference from the facts that they did make. For the reasons given by my Brother Willes I think they were competent to do so.

Rule absolute.

Attorney for plaintiff: *Wrentmore, for Jones & Carter.*

Attorneys for defendants: *Humphries & Morgan, for David Lloyd.*

May 22.

BECHERVAISE *v.* LEWIS.

Joint and Several Promissory Note—Liability of Surety—Equitable Set-off of Debt due to Principal.

6 App Cas 6
6 QBD 542

In an action by the payee of a joint and several promissory note against one who, to the knowledge of the payee, joined in it as a surety only, it is competent to the surety, by way of equitable defence, to plead a special plea of a set-off due from the payee to the principal, arising out of the same transaction out of which the liability of the surety arose.

DECLARATION on a promissory note for 230*l.* 7*s.* 6*d.* made by the defendant on the 7th of October, 1864, payable to the plaintiff three months after date.

Pleas: 1. That the note was not made by the defendant alone, but was made by him and Thomas Rowe, and that he and Rowe thereby jointly and severally promised to pay the 230*l.* 7*s.* 6*d.* three months after date, and that afterwards, and before this suit, Rowe satisfied and discharged the note by payment.

2. By way of defence on equitable grounds, the defendant repeated the allegation in the first plea as to the note being a joint and several note, and that the note was made for and on account and in payment of a sum of 230*l.* 7*s.* 6*d.* which Rowe had agreed to pay to the plaintiff, and for the payment of which he the defendant was not in any respect liable otherwise than as surety for Rowe; that he, the defendant, joined in making the note only as surety for Rowe, as the plaintiff at the time of the making of the note well knew; that the plaintiff, after the making of the note, and in the life-time of Rowe, became, and at the time of the death of Rowe, which took place before this suit, was indebted to

Rowe in an amount equal to the amount of the note and of all other moneys due from Rowe to the plaintiff, which amount so due from the defendant at the commencement of this suit continued to be and still is wholly unsatisfied and due from the plaintiff; that the plaintiff became so indebted as aforesaid to Rowe without the consent of the defendant, and thereby without the defendant's consent prevented himself from recovering from Rowe in his life-time, or from his personal representative since his death, the amount of the said note; that the day on which the note became due and payable elapsed in the life-time of Rowe; that the plaintiff became indebted to Rowe as aforesaid in manner following, that is to say, the plaintiff and Rowe were partners, and certain debts were due to them as partners, and the plaintiff sold to Rowe, amongst other things, all his, the plaintiff's, interest in and title to the said debts for a certain price, and the note was made as aforesaid in renewal of another note payable to the plaintiff, made by the same parties, which last-mentioned note was made by the makers thereof, and was received by the plaintiff, to secure payment of part of the said price; that the plaintiff afterwards received great part of the debts which he so sold to Rowe, and to the whole of which by virtue of the sale Rowe was entitled, and the plaintiff in manner aforesaid became indebted to Rowe in the amount which he received; and that the defendant joined in making the notes relying on the said sale, and on the faith and in the expectation and in consideration that the plaintiff would allow Rowe to receive the debts; *and that there was no other consideration or value for making the notes* (1), which the plaintiff at the time of the making of the notes well knew.

Demurrer to the second plea, on the ground that the state of accounts between the plaintiff and Rowe afforded no defence to the action. Joinder.

J. Brown, Q.C. (*Mac Crae-Moir* with him), in support of the demurrer. The plea cannot be sustained, even as an equitable defence.

[WILLES, J. By the civil law and the French law it would be a good answer to the claim.]

---

(1) The plea was amended during the argument by adding the words in italics.

By the civil law, the cross-demand operated as compensation and extinguished the debt. By our law, however, it is optional whether the person sued will set up the cross-debt. So, if Rowe had sued the plaintiff for the cross-debt, it would have been optional with the plaintiff to set off the note or not. There is another distinction. By the civil law, the creditor is bound to discuss his remedy against the principal debtor before having recourse against the surety; whereas, according to our law, the surety must pay off the debt before he can avail himself of the securities which the principal holds. The contract of the defendant and Rowe is that they will pay the note at maturity; not that they will pay such sum as may remain upon a balance of accounts between Rowe and the payee. It may be conceded that, if there had been a dealing between the plaintiff and Rowe by which sums of money had gone in satisfaction of the note, that might have been pleaded in this action. The Statutes of Set-off (1) are confined to legal debts between the parties, their sole object being to prevent cross-actions between the same parties: Chitty on Contracts, 9th ed. 778, 779. In *Isberg* v. *Bowden* (2), to an action for freight due upon a charterparty, the defendant pleaded that the plaintiff entered into the charterparty as the master of the vessel, and for and on behalf and as agent for the owner, that the plaintiff never had any beneficial interest in the charterparty, nor had he any lien whatever on the freight, and that he brought the action solely as agent and trustee for the owner; the plea then proceeded to state that the owner was indebted in a certain sum to the defendant, which the latter thereby offered to set off against the plaintiff's demand: and it was held that such debt was not "a mutual debt *between the plaintiff and the defendant*" within the Statutes of Set-off. Martin, B., in delivering the judgment, says (3): "The party whom the defendant agreed to pay was the plaintiff, but the plaintiff was not the party who agreed to pay the defendant the debt sought to be set off."

[WILLES, J. Would not that have been a good equitable plea?]

Probably it would. In *Oulds* v. *Harrison* (4), to an action on a

(1) 2 Geo. 2, c. 22; 8 Geo. 2, c. 24.

(2) 8 Ex. 852; 22 L. J. (Ex.) 322.

(3) 8 Ex. at p. 860.

(4) 10 Ex. 572; 24 L. J. (Ex.) 66.

bill of exchange drawn by Bennett upon and accepted by the defendant, and indorsed by Bennett to the plaintiff, the defendant pleaded that, after the bill was due, and before Bennett indorsed it to the plaintiff, Bennett, being indebted to the defendant in a sum exceeding the amount of the bill and interest, the defendant elected to set off against the bill the debt so due to him, and gave notice of such his election to Bennett; and that Bennett indorsed the bill to the plaintiff after such notice: and it was held that this was a bad plea, since the indorsee of an overdue bill does not take it subject to claims arising out of collateral matters, such as set-off.

[WILLES, J. Was *Goodall* v. *Ray* (1) cited there?]

It was, and virtually overruled. (2)

[WILLES, J. There is a later case in the Exchequer Chamber on the same line of thought, where the plea was that, before the indorsement of the bill to the plaintiff, goods were deposited with the drawer as a security, with a power of sale, and that after the maturity of the bill the goods were sold and the proceeds received by the drawer, who still held the same, and that the bill was indorsed by the drawer to the plaintiff after it became due and subject to the equity of the proceeds of the sale of the goods being applied to the payment of the bill, and without value; and the plea was held good. (3)]

Since *Greenough* v. *M'Clelland* (4), a co-maker of a note may take advantage of his situation of surety, where the payee has notice of that fact, and gives time to the principal debtor. It is clear, therefore, that, if the plaintiff has so dealt with Rowe as to discharge him from liability on the note, that will avail as a defence here. And see *Ex parte Hanson*. (5)

[WILLES, J., suggested that the plea should be amended by adding the words in italics " and that there was no other consideration or value for making the notes." The amendment was adopted.]

The additional averment does not make the plea any better. It still shews nothing more than a cross-debt which Rowe might or might not have set off.

---

(1) 4 Dowl. 76.

(2) See the remarks of Parke, B., upon that case, in *Whitehead* v. *Walker*, 10 M. & W. 696, 698.

(3) *Holmes* v. *Kidd*, 3 H. & N. 891; 28 L. J. (Ex.) 112. 5 Jur N.S. 345

(4) 2 E. & E. 424; 30 L. J. (Q.B.) 15. 6 Jur N.S. 772

(5) 12 Ves. 346.

[WILLES, J. It shews that the liability of the defendant upon the note arose out of the same transaction which gives rise to the set-off.]

Bowen, contrà. This is not a negotiable instrument; it is a note payable to the plaintiff. The facts disclosed by the plea shew a state of things which would entitle the defendant to a perpetual and unconditional injunction in equity. The substance is, that the plaintiff has in his hands moneys of Rowe, the principal debtor, more than sufficient to satisfy this note. That clearly affords a good defence upon equitable grounds: *Marcon* v. *Bloxam* (1); *Cochrane* v. *Green.* (2) This plea clearly falls within the rule laid down by Lord Campbell as to equitable pleas, in *Wodehouse* v. *Farebrother.* (3)

[WILLES, J. If the defendant pays this money, he will have a remedy against Rowe's executors.]

Doubtless he will.

Brown, Q.C., in reply. The plea studiously avoids saying that the plaintiff agreed that Rowe should receive these debts. If the language is ambiguous, it must be construed against the party using it.

[WILLES, J. No doubt we should uphold an equitable set-off where there would be a good set-off against the plaintiff at law by the cestui que trust. As this plea is framed, it involves some nicety, and we will take time to consider.]

Cur. adv. vult.

May 22nd. The judgment of the Court (Willes, Keating, Montague Smith, and Brett, JJ.) was delivered by

WILLES, J. The declaration is upon a promissory note made by the defendant payable to the plaintiff. The second plea, for a defence on equitable grounds, states that the note was not made by the defendant alone, but was a joint and several note by him and one Rowe; that it was made for and on account and in payment of a sum which Rowe had agreed to pay the plaintiff and for which the defendant was not liable otherwise than as surety for Rowe; that the plaintiff at the time of the making of the note knew that the defendant was a surety only; that the plaintiff, after the making of the note, became indebted to Rowe in an amount equal to the amount of the note and of all other moneys due from Rowe to the plaintiff, which debt remained unsatisfied; that the defendant became so indebted to Rowe without the consent of the defendant, and thereby without the defendant's consent prevented himself from recovering from Rowe the amount of the note. The plea then goes on to shew how the plaintiff became indebted to Rowe, viz. by having received certain partnership debts which he had sold to Rowe, and for part of the purchase-money for which the note in question was given: it then goes on to aver that the defendant joined in making the note relying on the said sale, and on the faith and in the expectation and in consideration that the plaintiff would allow Rowe to receive the debts, and that there was no other consideration or value for making the note, which the plaintiff at the time of the making of the note well knew.

---

(1) 11 Ex. 586; 25 L. J. (Ex.) 193.

(2) 9 C. B. (N.S.) 448; 30 L. J. (C.P.) 97. 7 Jur N.S. 548

(3) 5 E. & B. 277, 288; 25 L. J. (Q.B.) 18. 1 Jur N.S. 998

In substance, the plea is a special plea by a surety, of a set-off by the principal, arising out of the same transaction out of which the liability of the surety on the note arose.

A surety has a right, as against the creditor, when he has paid the debt, to have for reimbursement the benefit of all securities which the creditor holds against the principal. This alone would not help the defendant here, because he has not, nor has the principal, actually paid the creditor, and in our law set-off is not regarded as an extinction of the debt between the parties.

[illegible]

The surety, however, has another right, viz. that, as soon as his obligation to pay is become absolute, he has a right in equity to be exonerated by his principal.

Thus we have a creditor who is equally liable to the principal as the principal to him, and against whom the principal has a good defence in law and equity, and a surety who is entitled in equity to call upon the principal to exonerate him.

In this state of things, we are bound to conclude that the surety has a defence in equity against the creditor; and we are justified in doing so by the authority of the civil law alluded to in the course of the argument, to be found in Dig. Lib. xvi. tit. II. sec-

1872

BECHERVAISE v. LEWIS.

tion 4: "Verum est, quod et Neratio placebat et Pomponius ait, ipso jure eo minus fidejussorum ex omni contractu debere, quod ex compensatione reus retinere potest. Sicut enim cum totum peto a reo, male peto, ite et fidejussor non tenetur ipso jure in majorem quantitatem, quam reus condemnari potest."

There must, therefore, be judgment for the defendant upon the demurrer.

Judgment for the defendant.

Attorneys for plaintiff: *Miller & Miller.*
Attorney for defendant: *T. H. Smith.*

May 28.

RICE, APPELLANT; SLEE, RESPONDENT.

Beerhouse—Time of closing under 3 & 4 *Vict. c.* 61, *s.* 15—"*Parish or Place.*"

Teignmouth is divided into two parishes, viz. East Teignmouth and West Teignmouth. The former contains less than 2500 inhabitants: but the two together contain more than that number:—

Held, that Teignmouth was a "place" in which a beershop might lawfully be kept open until 11 P.M., under the provisions of 3 & 4 Vict. c. 61, s. 15, and therefore that the appellant, whose house was situate in East Teignmouth, was not liable to be convicted under that section for keeping it open after 10 P.M.

CASE stated by Justices of Devon under 20 & 21 Vict. c. 43.

1. At a petty session holden at Teignmouth, in and for the division of Teignbridge, Devon, on the 11th of September, 1871, an information preferred by William Slee, a police constable, against Edward Rice, under 3 & 4 Vict. c. 61, s. 15 (1), charged that Rice, on the 6th of September, 1871, at the parish of East Teignmouth, then being a beerhouse keeper, and duly licensed to sell beer, ale, and porter by retail, to be drunk and consumed in

---

(1) 3 & 4 Vict. c. 61, s. 15: "No person licensed to sell beer or cider by retail under the recited Acts [11 Geo. 4 & 1 Wm. 4, c. 64, and 4 & 5 Wm. 4, c. 85,] or this Act shall have or keep his house open for the sale of beer or cider, nor shall sell or retail beer or cider, nor shall suffer any beer or cider to be drunk or consumed in or at such house, at any time before the hour of 5 of the clock in the morning nor after 12 of the clock at night of any day in the week in the cities of London or Westminster, or within the boundaries of any of the boroughs of Marylebone, Finsbury, the Tower Hamlets, Lambeth, or Southwark, as defined by 2 & 3 Wm. 4, c. 64, nor after 11 of the clock within any parish or place within the bills of mortality, or within any city, cinque port, town corporate, parish, or *place* the population of which, according to the

his house and premises there situate, &c., unlawfully did keep his house and premises open for the sale of beer after 10 o'clock at night, to wit, at 11.30 P.M., the parish of East Teignmouth and the said house and premises not being within the bills of mortality, nor within any city, cinque port, town corporate, parish, or place the population of which, according to the last parliamentary census, exceeds 2500 persons, or within one mile, measured as directed by the statute in that case made and provided, from any polling place used at the last election for any town having the like population and returning a member to serve in parliament, contrary to the statute, &c. The appellant was convicted, and fined 16*s.* 6*d.*

2. It was proved that the appellant was duly licensed.

3. It was further proved that the house was found open on the night in question at 11.30, and men were there drinking beer, the appellant being in the room with them. It was admitted by the respondent that Teignmouth is divided into two parishes, East Teignmouth and West Teignmouth, and that the two parishes are connected together by an aggregation of houses; that the division of the parishes is by a small rivulet varying in width from five to ten feet, and that houses in some parts are erected over it; that West Teignmouth was a polling place at the last election for the county; that the town itself is under the Local Government Act, and that an improvement rate is levied conjointly on both parishes as one place; and that, for the purposes of the maintenance of the poor, separate rates are made for each parish, and overseers appointed for each parish.

4. It was admitted that all parochial officers, viz. constables, overseers, and churchwardens, are annually appointed for each parish.

5. It was proved by the clerk to the district registrar that the

---

last parliamentary census, shall exceed 2500, or within one mile, to be measured as aforesaid [by the nearest public street or path: s. 1], from any polling place used at the last election for any town having the like population and returning a member or members to parliament, nor after 10 of the clock in the evening elsewhere, nor at any time before 1 of the clock in the afternoon, nor at any time during which the houses of licensed victuallers now are or hereafter shall be closed, on any Sunday, Good Friday, Christmas Day, or any day appointed for a public fast or thanksgiving; and, if any such person shall keep his house open for selling beer or cider, or shall sell or retail beer or cider, at any time other than as hereinbefore prescribed and directed, such person shall forfeit 40*s.* for every offence, and every separate sale shall be deemed a separate offence."

1872

RICE v. SLEE.

population of East Teignmouth at the last census was 2396, and that was the return made to the superintendent registrar.

6. The same witness stated, on cross-examination, that the parish of West Teignmouth at the last census had a population of 4308; that Teignmouth is divided into two parishes, East and West Teignmouth, which are connected by an aggregation of houses; and that the population of the two parishes at the last census was 6704.

7. It was contended for the appellant, that, although it appeared by the evidence that the parish of East Teignmouth contained 2396 inhabitants, and West Teignmouth contained 4308 inhabitants, yet Teignmouth was a "place" in itself within the meaning of 3 & 4 Vict. c. 61, s. 15, containing more than 2500 inhabitants, and a district polling place for Dawlish, Bishopsteignton, Ideford, and the parishes of East and West Teignmouth, and returning members for the east division of Devon, in which these several places are situate; and consequently that he was entitled, within s. 15 of the Act, to keep his licensed house open until 11 P.M. *Reg.* v. *Charlesworth* was cited. (1)

8. The following admissions were made:—That the appellant's beerhouse was within 500 yards (measured as directed by the statute) from the district polling place of West Teignmouth used in the last election for the above parishes, and returning members to parliament for the respective towns, &c., as members for the east division of Devon: That the town of Teignmouth has no right peculiar to itself, nor does it send any member or members to serve in parliament and to represent it as a town corporate, parish, or place, but only as forming a portion of the east division of Devon: That separate rates are made in each parish for the relief of the poor, but that the amounts collected are paid into the common fund of the union, and apportioned to the respective parishes in proportion to the value of their rateable property: That East and West Teignmouth are an aggregation of houses, and known as the town of Teignmouth, a watering-place and seaport town, and built and situate in two parishes called respectively East Teignmouth and West Teignmouth, the two parishes being defined [divided] by an underground rivulet called Thame Rivulet, varying in width

(1) 20 L. J. (M.C.) 181.

in its course through the town from five to ten feet, and emptying itself into the river Teign; and that over and upon the said rivulet are erected and made at various points dwelling-houses, shops causeways, and streets: That the appellant is owner and occupier of the beerhouse and premises, assessed at the gross sum of 30*l.*, situate in the parish of East Teignmouth, and duly licensed; and that the beerhouse is within 100 yards of the rivulet.

9. The magistrates were of opinion that the parish of East Teignmouth did not at the census of 1861 or 1871 contain a population of 2500 inhabitants, and was not within the bills of mortality, nor within any city, cinque port, town corporate, parish, or place the population of which according to the last parliamentary census exceeded 2500 persons, or within one mile (measured as directed by the statute in that case made and provided) from any polling-place used at the last election for any town having the like population, and returning a member to serve in parliament, and therefore convicted the appellant as above mentioned.

The question for the opinion of the Court was, whether the conviction was right in law.

Lord, for the appellant. This case is disposed of by the decision of the Court of Queen's Bench in *Reg.* v *Charlesworth.* (1) Holmfirth, a locality which comprised parts of three townships, two of which were in one parish and one in another, each separately maintaining its own poor, contained a population exceeding 2500 inhabitants. It had no local rights peculiar to itself, being an aggregation of houses and inhabitants which had received a separate name. The Court held,—affirming the decision of the justices,—that Holmfirth was a "place" in which a beershop might be kept open until 11 o'clock at night, under the provisions of 3 & 4 Vict. c. 61, s. 15. So, here, Teignmouth, which comprises East Teignmouth and West Teignmouth, is a "place" the aggregate of whose population exceeds 2500, and consequently the decision of the magistrates in this case was wrong.

Folkard, for the respondent, relied upon *Preston* v. *Buckley.* (2) By 3 & 4 Vict. c. 61, s. 1, no licence to sell beer or cider by retail shall be granted in respect of any dwelling-house which shall not

(1) 20 L. J. (M.C.) 181. (2) Law Rep. 5 Q. B. 391.

1872

RICE
v.
SLEE.

be rated to the relief of the poor of the parish, township, or place in which such house is situate, on a rent or annual value of 15*l.* at least, if situate in any city, cinque port, town corporate, parish, or place, the population of which exceeds 10,000. By the interpretation clause, "parish or place" includes any township or place separately maintaining its own poor. A house was situate in and rated at less than 15*l.* annual value to the poor-rate of a township which separately maintained its own poor, and had a population under 10,000; but the township formed part of a very extensive parish which had a population exceeding that number. It was held that the population of the larger district, and not that of the rating area, governed the amount of rating, and that, the house being situate in a parish of which the population exceeded 10,000, rating under 15*l.* was insufficient.

WILLES, J. After the decision of the Court of Queen's Bench in *Reg.* v. *Charlesworth* (1), there is nothing to be said. Holmfirth was a hamlet or vill having less than 2500 inhabitants; yet, inasmuch as the parish of which it formed part contained a larger number, the magistrates rightly held that the respondent could not be convicted under this Act. That decision is based upon a principle which is applicable here. In order to justify the conviction, it should have been shewn that Teignmouth is not a "place" having 2500 inhabitants. Now, Teignmouth consists of two parts, East and West Teignmouth, the aggregate number of the inhabitants of which exceeds 2500. The conviction therefore was wrong. The magistrates seem to have overlooked the alternative "parish or place."

KEATING, J. I am of the same opinion. The number of inhabitants of the parish or the place, whichever is the larger area of the two, is to govern. The case cited by Mr. Folkard upholds that view.

Conviction quashed.

Attorney for appellant: *E. M. Hore, for Schank, Teignmouth.*

Attorneys for respondent: *Le Riche & Son, for Carter, Torquay.*

---

(1) 20 L. J. (M.C.) 181.

STARR, Appellant; STRINGER, Respondent.

1872
June 2.

Stamping Weights and Measures—5 & 6 *Wm.* 4, *c.* 63, *s.* 21.

Where weights or measures have once been duly stamped or sealed under s. 21 of 5 & 6 Wm. 4, c. 63, but the stamp or seal has become obliterated by time and use, the person using them is not liable to the penalty imposed by that section for the use of unauthorized weights or measures, provided such weights or measures be otherwise unobjectionable.

Case stated by Justices of Kent under 20 & 21 Vict. c. 43.

At a petty sessions held at Tunbridge Wells, Kent, on the 3rd of July, 1871, the appellant was convicted upon an information preferred by the respondent, an inspector of weights and measures, under s. 21 of 5 & 6 Wm. 4, c. 63, and fined 1*s.* and costs, for unlawfully using a 2lb. weight, "the same not having been stamped according to the statute in that behalf."

1. Upon the hearing of the information the respondent proved that he was the inspector of weights and measures in the district where the appellant carried on his business, and on the 22nd of June, 1871, he made an examination of the weights, scales, and measures at the shop occupied by the appellant, who was a fruiterer and greengrocer, and found a 2lb. weight which had no visible stamp, but was otherwise correct. It was an iron weight with a copper plug, and appeared as if it had been in use some time. He had examined the appellant's weights three times, but could not say that he had ever seen this 2lb. weight before; and he told the appellant that it had never been before him. The respondent's assistant stated that he could find no mark of a stamp, but that he had several times seen a 2lb. weight in the appellant's shop.

2. It was contended for the appellant that the only issue to be tried was, whether or not the 2lb. weight had ever been stamped, the words of the statute (1) and of the information being in the past

---

(1) Sect. 21 enacts, "That the justices of the peace in general or quarter session assembled, &c., shall provide for the use of the inspectors good and sufficient stamps for stamping or sealing weights and measures used or to be used in each and every county," &c.; and that "all weights and measures whatsoever, except, &c., which shall be used, &c., shall be examined and com-

1872

STARR v. STRINGER.

tense; and the appellant's son stated that in July, 1869, he took four iron weights to the respondent, and saw him stamp them all, including the 2lb. weight in question; that no other 2lb. weight had ever been used in the shop; that the respondent had several times examined the 2lb. weight, but had never before complained of the want of a stamp; and that the copper plug on which the stamp was impressed, being higher than the surface of the weight itself, had been worn away. The appellant's shopman also stated that the 2lb. weight had been in daily use for the past two years, and that there had never been any other 2lb. weight in the appellant's shop; and he corroborated the statement of the appellant's son as to the wearing away of the copper plug, and as to the respondent having several times examined the 2lb. weight without making any complaint.

3. Upon this evidence the counsel for the appellant contended that the complaint "that the weight had not been stamped" was disproved.

4. The justices examined the weight, and decided that, as it bore no appearance of a stamp, the appellant must be convicted.

The question for the Court was, whether, taking into consideration the precise words of the statute, the evidence given to prove that the weight had been stamped in 1869, and the fact that the weight itself on examination by the respondent bore no trace of a stamp, the appellant was legally convicted.

E. B. Stone, for the appellant. The weight having been proved to have once been stamped, the magistrates ought not to have convicted the appellant. There is no provision in the Act for re-stamping. The 27th section provides that "no weight or measure duly stamped by an inspector appointed under the authority of the 5 Geo. 4, c. 74, or this Act, &c., shall be liable to

---

pared with one or more of the copies of the imperial standard weights and measures provided under the authority of this Act for the purpose of comparison by such inspectors, who shall stamp, in such manner as best to prevent fraud, such weights and measures when so examined and compared, if found to correspond with the said copies;" and that "every person who shall use any weight or measure other than those authorized by this Act, or which has not been so stamped as aforesaid, or which shall be found light or otherwise unjust, shall, on conviction, forfeit a sum not exceeding 5*l*."

be re-stamped, although the same be used in any other place than that at which the same was originally stamped, but shall be considered as a legal weight or measure throughout the United Kingdom, unless found to be defective or unjust."

[WILLES, J. That section has no application; it only means that a weight duly stamped and sufficient in one county or place may be used elsewhere without re-stamping.]

The respondent did not appear.

WILLES, J. It seems to me that there was abundant evidence that the weight in question was originally a stamped weight, and therefore the appellant was not liable to the penalty imposed by s. 21 of 5 & 6 Wm. 4, c. 63.

Our duty under the statute which gives the appeal is merely to answer the question proposed by the magistrates for our consideration as matter of law. All that we can say is, that, if we had to draw inferences from the facts stated in this case, we should hold that the weight in question had been duly stamped, and that the appellant ought not to have been convicted. The weight was a just weight, and there was strong evidence that it had been stamped. The conviction must be quashed, and the case must go back to the magistrates, who, unless they had good reason (which they have not stated) to disbelieve the appellant's evidence, should dismiss the information.

Stone asked for costs against the respondent.

KEATING, J. We think that, as the respondent himself was proved to have stamped the weight, the appellant is entitled to the costs of the appeal, provided the magistrates shall dismiss the complaint.

Rule accordingly.

Attorney for appellant: *Philip Wood, for Walter Sprott, Mayfield.*

1872
June 4.

POWER, Appellant; WIGMORE, Respondent.

Building Act (18 & 19 *Vict. c.* 122) *s.* 49—*District Surveyor's Fees—Appeal under* 20 *&* 21 *Vict. c.* 43.

Under the Building Act (18 & 19 Vict. c. 122), s. 49, and the schedule thereto, the district surveyor is entitled to a fee of 10*s.* "for inspecting the arches or stone floors over or under public ways:"—

Held, that, where a builder is employed to construct a series of arches for cellars under a public street or streets surrounding a vacant piece of land which is to be let for building, the district surveyor is entitled to a fee of 10*s.* in respect of each distinct building to which any given number of the arches is intended to be appropriated,—a matter of fact which is to be ascertained and determined by the magistrate before whom the fee is sought to be recovered.

Held, also, that the decision of the magistrate upon such a summons is the subject of an appeal under 20 & 21 Vict. c. 43, notwithstanding s. 106 (the appeal clause) of the Building Act.

Case stated by Justices of London, under 20 & 21 Vict. c. 43.

1. Upon the hearing of a summons obtained by the appellant against the respondent under ss. 25, 31, 49, 51, and sched. 2 of the Metropolitan Building Act (18 & 19 Vict. c. 122), whereby the respondent was charged for that, on the 26th of July, 1870, certain arches under the public way situate in Newgate Market, and within the limits of the Metropolitan Building Act, 1855, and within the district of the southern division of the city of London, of which the appellant was district surveyor under the Act, were completed, and that at the expiration of fourteen days after such completion, to wit, on the 10th of August, 1870, he, the appellant, became entitled to receive from the respondent as the builder employed in erecting such arches the amount of fees due to him specified in the second schedule to the Act, to wit, 25*l.* 10*s.*, and that, on the 29th of August, 1870, the appellant caused a proper bill specifying the amount of such fees to be sent to the respondent in a registered letter, but the respondent had contrary to the form of the statute refused to pay the same,—the sitting alderman at the Guildhall justice room ordered the respondent to pay to the appellant 10*s.* and costs.

2. The following facts were proved or admitted:—The appellant was and is the district surveyor for the southern division of the city of London, and his district includes the old Newgate Market.

On the 8th of June, 1870, he received a notice from the respondent that he intended to build fifty-one arches under a public highway in old Newgate Market. The appellant went to the place described on the 12th of June, and measured and surveyed the place where these arches were intended to be built. About ten or twelve days afterwards he found one or two of the arches completed. By the 26th of July the fifty-one arches were complete; and in the time between the 12th of June and the 26th of July he was obliged to go, and went, fifteen or sixteen times to inspect them while they were in progress. In the discharge of his duties under the Act, he was obliged to measure the arches from time to time to see that the walls were of a proper thickness, and that the arches were of a proper width and span, and constructed in accordance with the statute. The arches varied in size (1); and the appellant was therefore compelled to measure and examine every one of them separately. They were not arches attached to houses, but were built on a vacant piece of ground under what was and is a public highway. The arches were built on the four sides of a paralellogram. Each arch or vault was separated by a pier in brick-work, open in front; and there was no internal communication or mode of access whatever from one vault to another.

3. On the part of the appellant it was contended that each arch was a separate structure, and that he was entitled to a fee of 10*s.* for each, amounting in the whole to 25*l.* 10*s.*

4. On the part of the respondent it was contended that the words in the schedule, "for inspecting the arches or stone floors over or under public ways, 10*s.*," meant that the appellant was only entitled to one sum of 10*s.* for inspecting any number of arches under or over any public way, and that no greater fee could be demanded. It was also contended on the part of the respondent, that, under s. 106 of the Act, the decision of the justices is final, and that no appeal can be made.

5. The sitting alderman, being of opinion that the contention of the respondent was correct, and that the appellant was only entitled to 10*s.*, gave his determination against the larger claim before stated.

---

(1) According to a plan annexed to the case, they appeared to vary in width from 6 ft. 6 in. to 10 ft. each.

1872

POWER
v.
WIGMORE.

The questions for the opinion of the Court were,—1. Whether the justices had any power under s. 106 of the Act to state a case when the subject-matter of dispute is in respect of district surveyors' fees; 2. Whether, under the circumstances above stated, the appellant was entitled to any and what larger fee than the fee of 10*s*. If the Court should be of opinion that an appeal could be made, and that the appellant was only entitled to the fee of 10*s*., then the decision was to stand. If the Court should be of opinion that the appellant was entitled to a larger sum, the case was to be remitted to the alderman with the opinion of the Court thereon.

Geary, for the appellant. The first question is whether the magistrate had power to state a case, under 20 & 21 Vict. c. 43, upon a matter as to which the right of appeal under the Building Acts (18 & 19 Vict. c. 122) is expressly excluded. (1)

[WILLES, J. It must not be assumed that because an appeal is given under another Act of Parliament, the magistrate may not state a case for the opinion of the Court under 20 & 21 Vict. c. 43.]

Sect. 25 of 18 & 19 Vict. c. 122, as to arches under public ways, enacts that, "if any arch or other construction of iron or other incombustible material is used, it shall be constructed in such manner as may be approved by the district-surveyor." The authority of the surveyor is conferred by s. 31, which provides that every building, and every work done to, in, or upon any building, shall be subject to the supervision of the district-surveyor appointed to the district in which the building is situate. The surveyor's fees are regulated by s. 49, which enacts that "there shall be paid to the district-surveyors, in respect of the several matters specified in the first part of the second schedule to the Act, the fees therein specified, or such other fees, not exceeding the amounts therein specified, as may from time to time be directed by the Metropolitan Board of Works; but only one fee shall be chargeable with respect to any such works done in, to, or upon any building as are in pursuance of the provisions hereinbefore con-

---

(1) By s. 106 an appeal is given "in every case, except in respect of fees of a district surveyor, in which jurisdiction is hereinbefore given to a justice of the peace."

1872

POWER
v.
WIGMORE.

tained [s. 38] included in one notice." There is no definition of "building" in the interpretation clause, s. 3. In the first part of the second schedule, under the heading "*Fees for new buildings*," the following are prescribed, viz. "For every building not exceeding 400 square feet in area, and not more than two stories in height, 30*s*.," "For every additional story, 5*s*.," and under the heading "*Fees for additions or alterations*," the following, viz. "For inspecting the arches or stone floors over or under public ways, 10*s*." Sect. 50 enacts that, "if any special service is required to be performed by the district-surveyor under the first part of this Act, for which no fee is specified in the said schedule, the Metropolitan Board of Works may order such fee to be paid for such sum as they think fit, and the district-surveyor shall have the same remedy for recovering such special fee as if the same were expressly named in the said schedule." And s. 51 regulates the periods when the surveyor shall be entitled to his fees, which are to be recovered in a summary way before a justice of the peace, upon its being shewn that a proper bill specifying the amount of such fees was delivered to the builder, owner, or occupier," &c. Under s. 49, and the schedule thereto, the surveyor was entitled to a fee of 10*s*. for inspecting each of the arches in question.

[WILLES, J. Sect. 49 would seem to limit the surveyor's right to one fee of 10*s*. in respect of each building to which these arches were intended to be appropriated: and, looking at the plan annexed to the case, the arches appear to vary from six feet six to ten feet in width. It is plain, therefore, that more than one arch was to be appropriated to each of the houses with which it was contemplated the land would be covered.]

If any houses were already erected upon the land, the surveyor's fee would no doubt be regulated by the number of arches appropriated to each house; but, in the absence of evidence to shew what buildings are erected or contemplated, the fee must be payable for each arch. Suppose no houses were erected for six years, how would the fees be estimated, and how could they be recovered?

[WILLES, J. No doubt, these arches were intended for cellars to future houses, as one sees every day where new streets are laid out. The magistrate should determine upon evidence before him how many arches were to be annexed to each house or building.]

The case of *Re Badger* (1) was referred to.

Chapman, contrà. It is perfectly consistent with the statements in this case that the whole of these arches might be appropriated to one building,—a railway-station, for instance. It is clear that the surveyor cannot be entitled to a fee of 10*s.* for each arch; and it may be that, in the absence of evidence of the number of arches to be appropriated to each building contemplated, it would be a case for the interposition of the board under s. 50.

[KEATING, J. The case does not seem to fall strictly within either schedule of the Act, but rather to be a case for a special fee for a special service. I certainly do not see my way to the adoption of Mr. Geary's argument, that the surveyor is entitled to a fee of 10*s.* for each arch.]

Geary, in reply. The arches were built for the purpose of completing the formation of the streets adjoining; and the land is "to let." It may be that the builder employed to erect the houses may not be the same that built the arches; and, if so, to whom is the surveyor to look for his fees?

[*Chapman.* Possibly to the lessee of each plot.]

WILLES, J. This is a case reserved for the opinion of this Court by a magistrate under s. 2 of 20 & 21 Vict. c. 43, which enacts that, "after the hearing and determination by a justice or justices of the peace of any information or complaint which he or they have power to determine in a summary way by any law now in force or hereafter to be made, either party to the proceeding before the said justice or justices may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing within three days after the same to the said justice or justices to state and sign a case setting forth the facts and the grounds of such determination, for the opinion thereon of one of the superior Courts of law, to be named by the party applying," &c. The 6th section provides that "the Court to which a case is transmitted under this Act shall hear and determine the question or questions of law arising thereon, and shall thereupon reverse, affirm, or amend the determination in respect of which the case has been stated, or remit the matter to the justice or justices with the opinion of the Court thereon, or make such other order in relation to the matter, and may make such order as to costs, as to the Court may seem fit," &c. It is not the sort of appeal which the parties are allowed under s. 106 of the Building Act (18 & 19 Vict. c. 122), which excludes the case of surveyors' fees. That section does not say that, in respect of a complaint as to surveyors' fees, the magistrate's decision shall not be subject to appeal. The fact of parties having a right of appeal under s. 106 of the Building Act, and the fact of the magistrate having jurisdiction to allow an appeal, if he thinks proper, under 20 & 21 Vict. c. 43, are by no means inconsistent; the two powers may well co-exist. There is nothing, either express or implied, in the Building Act to take away the general power given to the magistrate under 20 & 21 Vict. c. 43. This appeal, therefore, so far as it relates to a point of law, may be entertained by this Court.

---

(1) 8 E. & B. 728; 27 L. J. (M.C.) 106.

The point of law for our consideration is this, whether, if a number of arches are built under a public highway, whether of miles in length or surrounding a square, whatever be the number of the arches, provided they are erected in one continuous public way, the district-surveyor for inspecting them all is to be satisfied with one fee of 10*s*., under the second schedule of the Building Act. The magistrate, adopting the contention on the part of the respondent, decided that one fee of 10*s*. only was payable. That accounts for his not having found the facts specially. The case is certainly very bare; but all that we have to decide is, whether the surveyor is entitled to only one fee of 10*s*. under any state of circumstances, provided the notice under s. 38 embraces the whole of the arches. Taking the enacting part of the Act and the first part of the second schedule together, the literal construction would seem to be that the surveyor would be entitled to a fee of 10*s*. for inspecting each arch. But it is said that that is cut down by s. 49. To apply that section, however, it must be shewn, not merely that the whole of these arches are included in one notice, but also that they constitute or relate to one building. The result, as it seems to me, is, that, if these fifty-one arches are to be treated as one building, the whole being included in one notice, the fee for inspecting would be 10*s.* only, and the decision of the magistrate would be right. He has not, however, arrived at that conclusion; and the plan annexed to the case shews that the arches do not constitute a viaduct, but are designed and built for cellars under public streets, and therefore the decision is neither warranted by the schedule nor by s. 49. I think the magistrate ought to ascertain by evidence whether these arches were intended to form one building or to be appropriated in twos or threes or any other number to projected houses or buildings. If it were a viaduct, it would constitute one building, and the surveyor might be entitled to one fee of 10*s.* only. If the arches were intended to be appropriated as cellars to several houses or distinct buildings, they might properly be said to constitute several buildings. We cannot speculate upon the result; we must remit the case to the magistrate with this intimation of our opinion, and he will inquire whether the whole of the arches constituted one "building" or are to be attributed to several and how many distinct buildings, and determine what under the circumstances would be the proper fee.

KEATING, J., concurred.

Rule accordingly. (1)

Attorneys for appellant: *Chapman, Clarke, & Turner.*
Attorney for respondent: *Charles Turner, Fulham.*

(1) When the case went back to the magistrate, the area in question had been covered with twelve structures, which were called "Paternoster Buildings;" and he thereupon decided, in conformity with the opinion expressed by the Court, that the surveyor was entitled, for the inspection of the arches, to a fee of 10*s.* in respect of each of the twelve structures.

COPE, CLERK, APPELLANT; BARBER AND OTHERS, RESPONDENTS.

1872.
June 7.

Ecclesiastical Law—Collection of Offertory—Duty of Churchwardens—Molesting a Clergyman whilst celebrating Divine Service—23 & 24 Vict. c. 32, s. 2.

Upon an information under 23 & 24 Vict. c. 32, s. 2, against the respondents, for unlawfully molesting the appellant, "then being a clergyman in holy orders celebrating Divine service" in the parish church, the evidence was that the appellant (the incumbent), whilst engaged in collecting the offertory during the reading of the offertory sentences by another clergyman, was obstructed by the respondents, who claimed as churchwardens the right of themselves collecting. The magistrates decided that the respondents had not been guilty of the offence charged, inasmuch as the appellant was not at the time he was so obstructed "ministering or celebrating any sacrament or any Divine service, rite, or office:"—

Held, that their decision was right,—the duty of collecting the offertory being a lay duty imposed by the rubric upon the "deacons, churchwardens, or other fit person" (of lower degree) "appointed for that purpose."

CASE stated by Justices of Chester under 20 & 21 Vict. c. 43.

1. At a petty session holden at Macclesfield, in the county of Chester, an information was preferred against the respondents, Charles Barber, Thomas Clarke, and Thomas Hobson, charging that they, on the 24th of September last, "unlawfully did molest, let, disturb, vex, and trouble Francis Haden Cope, then being a clergyman in holy orders celebrating Divine service in a certain parish church of the Church of England, to wit, the parish church of the parish of Wilmslow there situate, and called the church of St. Bartholomew, contrary to the statute," &c.

2. Upon the hearing George Fox deposed as follows:—"I attended at Wilmslow parish church on Sunday morning the 24th of September, and the seat I occupy is No. 30 on the south side of the middle aisle. I was sitting at the entrance of my seat nearest the aisle. The service was conducted by the Rev. Mr. Cope, the Rev. Mr. Hinder, and the Rev. Mr. Cocks; and at the appointed time in the communion service Mr. Cope preached. At that time Mr. Cocks and Mr. Hinder sat within the communion rails. Immediately after the sermon Mr. Cocks went up to the altar, and proceeded to read the offertory sentences, and Mr. Cope and Mr. Hinder then began the collection of the people's offerings. Mr. Hinder went into the Prescott Chapel and commenced his collec-

1872

COPE v. BARBER.

tion there, and, Mr. Cope descending from the pulpit at the same time, they both came down the chancel steps together, Mr. Hinder turning to his left hand, and Mr. Cope, with a bag in either hand, commenced to take the offertory down the middle aisle. Mr. Cocks during this time was reading the offertory sentences. Mr. Cope had proceeded to within two pews of where I was sitting before I noticed anything: but simultaneously with Mr. Cope descending from the pulpit, I heard, but did not see at the moment, the defendants coming from their pew at the extreme west end of the church. I then looked round and saw Dr. Clarke collecting from the south side of the middle aisle, and Mr. Barber from the north side; and at the same moment Mr. Hobson came towards them. These three gentlemen were all in the same aisle; Dr. Clarke occupied the south side, Mr. Barber the north side, Mr. Hobson filling up between the two, with his hands behind his back. This was their position when they were abreast of the pew I was occupying. They proceeded until they met Mr. Cope. Mr. Cope then essayed to pass by Dr. Clarke, when Dr. Clarke put his hand on the side of the pew, so as to form a barrier with his arm, and swaying his body at the same moment in the same direction so as the more perfectly to impede Mr. Cope's progress. Mr. Hobson, who up to this moment was about eighteen inches behind the other two gentlemen, immediately stepped forward, took his hands from behind his back, and put one so as to form a support to Dr. Clarke. Mr. Cope then turned to the other or north side; and immediately thereupon Mr. Barber laid hold of the pew with his left hand in the same way precisely; and Mr. Hobson at the same moment threw himself to the other side of the aisle so as to support Mr. Barber. Seeing this, Mr. Cope seemed a good deal embarrassed. He seemed as if he did not exactly know what to do; but, at last, he endeavoured to pass between the two defendants Clarke and Barber, when Hobson immediately put himself in the centre so as effectually to obstruct Mr. Cope passing between. A lady, seeing the embarrassment of Mr. Cope, took one of bags from him and passed it down among the congregation behind her, and it was passed on by the people from pew to pew until it got down to the west end of the church. The position of the three defendants on this occasion was such as to prevent Mr. Cope from passing without his having recourse to violence; and there is no doubt their position was one of menace, as they assumed a defiant menacing position. The result was that Mr. Cope was obliged to return back again to the eastern part or head of the aisle, when he saw that it was impossible to pass without using physical force. Instead, however, of ascending the chancel steps, the complainant turned to the north side of the church, and proceeded collecting the offertory down it and along a portion of the west, and then turned up the middle aisle collecting on the north side of it, where he had been unable to collect before by reason of the defendants' obstruction. The congregation who occupied the south side of the middle aisle had meanwhile among themselves collected on that side, and the bag in which they had placed their offerings was then given to the complainant again. The three defendants then came up to the top of the centre aisle, and there they remained in the same attitude as when Mr. Cope had been originally stopped by them, so that it was impossible for him to pass. They did not physically impede him there, because he did not proceed up the middle aisle from the west, but went along the west aisle and up the south aisle, collecting the offerings of the people as he went, till he joined the Rev. Mr. Hinder. Then, Mr. Cope and Mr. Hinder together went up to the communion-table with the offertory they had collected. Mr. Barber and Dr. Clarke then followed them up the chancel, and Mr. Hobson turned down the centre aisle again to his pew. He had not a collecting box or anything in his hand at any part of the time."

Upon cross-examination by the defendants, the witness said: "You (the defendants) have collected occasionally. You did not strike Mr. Cope. You did not speak to him. Your attitude was defiant and menacing. I believe the boxes which were in the hands of Dr. Clarke and Mr. Barber were given up to the Rev. Mr. Cocks. I know nothing of my own knowledge about the swearing in or the admission of the rival churchwardens, not having been present at the visitation. No churchwardens other than you and Mr. Walworth absolutely have acted for the church for the last eighteen months."

3. The evidence of this witness was corroborated by that of two others.

4. Counsel for the complainant stated that he had other witnesses; but the defendants said they did not dispute the facts, but wished the complainant to be put into the witness-box. He was accordingly sworn, but asked no question in chief. Upon cross-examination by the defendants, he said: "There are unfortunately two sets of persons claiming to be churchwardens of Wilmslow. I have never recognized you as being churchwardens. You have for about eighteen months prior to the 30th of July last collected the alms of the people in the church, because you have threatened to stop any others doing so. No others than you and Mr. Walworth have so collected, except myself and the curate. I first collected on the 30th of July last. On the first Sunday in each month since the 30th of July you and those acting with you have been allowed to collect, because then the alms, under the terms of the archdeacon's compromise, are devoted solely to the relief of the poor and sick, because I thought you would collect them properly. You were not allowed to collect the alms on the Sundays appointed for the offertory for the church expenses, because I knew they would not be properly collected. Sometimes an empty box would be brought up by you; and in the whole time you were allowed to collect you only collected 4*l.* 6*s.* 1*d.* I am a clergyman in holy orders. I am a deacon and priest. I am not a bishop or an archbishop. On the Sunday on which I complain of your acts two of you did bring up the boxes you had held, which contained together the sum of 5*s.* 6*d.* You brought this sum to the clergyman at the altar, but I cannot say you brought it either respectfully or courteously."

Upon re-examination the complainant said that during the dispute as to which set of churchwardens were lawfully elected the defendants and Mr. Walworth had been allowed by the rival churchwardens, for the sake of peace, to collect the alms for the sick and poor, about which no dispute had ever arisen. The disputes were about the offertories for church expenses. Formal notice was given by him (appellant) that the clergy would collect for church expenses. From the 30th of July to the 24th of September the total amount collected by the clergy was 35*l.* 8*s.* 2*d.*, and by the defendants 4*l.* 6*s.* 1*d.* He (appellant) adopted the plan of the clergy collecting, at the request of the congregation.

5. It was admitted by the complainant that, at the chancellor's visitation after Easter, 1871, the defendants presented themselves for admission as churchwardens, and made the declaration now by the law substituted for an oath; that Mr. Cobbett and Mr. Walworth, Mr. Taylor and Mr. Lathbury, had previously presented themselves in the same character and had previously made the declaration, and that counsel for Mr. Cobbett and Mr. Walworth had (prior to the defendants being allowed to make the declaration) protested against the validity of their appointment; that the chancellor had, notwithstanding, proceeded to administer the declaration to the defendants; and that since that the defendants had continuously claimed to be the legal churchwardens of Wilmslow.

6. When called upon for their defence, Dr. Clarke, on behalf of all the defendants, read a paper as follows: "This summons charges us with behaving unlawfully to the Rev. Mr. Cope and the Rev. Mr. Hinder, when administering Divine service on the 24th of September last in the parish church of Wilmslow. To this we reply, first, that we did nothing unlawfully on that day. We maintain that we are churchwardens duly and legally sworn in on two occasions before the archdeacon; that we alone almost have acted as churchwardens for more than eighteen months; and that the clergy have allowed us even during this dispute to collect the alms for the sick and poor unmolested; that on this particular Sunday the offertory was for the expenses of the church, which we had not refused to collect; and we do allow that, acting as wardens, and having collected in our part of the church, we did stop the clergy from collecting it over again, because it had been complained of; but we deny that we either spoke a word, lifted a hand, or touched them even so much as with a finger. The money we had collected we handed over to them at the communion-table in the usual way. Secondly, we maintain that the clergy were not performing Divine service, but that they were wandering up and down the church collecting money for a secular purpose. We affirm that they had no business to collect at all; that is a lay function, and the special and absolute duty of the wardens alone. And we hold that it would be just as scandalous for us to assume their duties as for them to assume ours. Moreover, the rubric

1872

COPE
v.
BARBER.

distinctly commands them as priests to remain at the communion-table to read the offertory sentences and to receive the alms from those who collect. They (Mr. Cope and Mr. Hinder) were in a part of the church, therefore, where they had no business to be, and doing something they had no business to do,—something, indeed, opposed to all law, to all customs, and even to all decency. We contend, therefore, that we acted lawfully in virtue and right of our office as churchwardens, and that they (Mr. Cope and Mr. Hinder) were wrong."

7. The justices upon this evidence were of opinion and adjudged that it was the duty of the churchwardens to collect the offertory, and not that of the complainant, and consequently dismissed the summons; but they stated their willingness to grant a case for the opinion of a superior Court; and, if such Court should be of opinion that, upon the evidence, and having regard to the true intent and meaning of the statute, they (the justices) ought to have convicted the defendants or any one or more of them, they were of opinion that in such case each defendant or such one or more should be fined 20*s.* and costs.

The question for the opinion of the Court was, whether, upon the undisputed evidence above set forth, and which the justices found to be true in fact, and having regard to the position and claims of the defendants disclosed on the evidence, an offence against the statute 23 & 24 Vict. c. 32, s. 2, had been committed by them.

Manisty, Q.C. (*Edwards* with him), for the appellant. This is an information against the respondents under s. 2 of 23 & 24 Vict. c. 32. (1) Two points may be considered, viz. 1. Whether Mr.

---

(1) 23 & 24 Vict. c. 32, s. 2. "Any person who shall be guilty of riotous, violent, or indecent behaviour in any cathedral church, parish or district church or chapel of the Church of England, or in any chapel of any religious denomination, or in England in any place of religious worship duly certified under the provisions of the 18 & 19 Vict. c. 81, whether during the celebration of Divine service or at any other time, or in any churchyard or burial-ground, or who shall molest, let, disturb, vex, or trouble, or by any other unlawful means disquiet or misuse any preacher duly authorized to preach therein, or any clergyman in holy orders ministering or celebrating any sacrament or any Divine service, rite, or office in any cathedral, church, or chapel, or in any churchyard or burial-ground, shall, on conviction thereof before two justices of the peace,

Cope was not at the time of the interruption engaged in the performance of Divine service; 2. Whether the respondents were not guilty of indecent and improper conduct, even assuming that Mr. Cope had no strict legal right to do what he was doing. There being three officiating clergymen, whilst one of them was at the communion-table reading the offertory sentences, Mr. Cope proceeded to assist in the collection of the offertory, or the alms of the people. The direction in the rubric as to the mode of collecting these is as follows:—"Whilst these sentences are in reading, the deacons, churchwardens, or other fit person appointed for that purpose, shall receive the alms for the poor, and other devotions of the people, in a decent basin to be provided by the parish for that purpose, and reverently bring it to the priest, who shall humbly present and place it upon the Holy Table." The collection of alms is part of Divine service. In *Hutchins* v. *Denziloe* (1), where the duties of the churchwardens are discussed, Sir William Scott says (2): "I conceive that originally they were confined to the care of the ecclesiastical property of the parish, over which they exercise a discretionary power for specific purposes. In all other respects, it is an office of observation and complaint, but not of control, with respect to Divine worship: so it is laid down in Ayliffe, Parergon, p. 170, in one of the best dissertations on the duties of churchwardens, and in the Canons of 1571." And a little further on he adds: "In the service, the churchwardens have nothing to do but to collect the alms at the offertory." But, though the duty of collecting is cast upon the churchwardens, there is nothing to prevent the clergyman from doing it.

[WILLES, J. Possibly, if the churchwardens are objectionable persons, for instance, persons notoriously leading bad lives so as not to be admissible to the sacrament, the clergyman may appoint "a fit person" to collect.]

Or himself collect. The statute was intended to give a summary

---

be liable to a penalty of not more than 5*l.* for every such offence, or may, if the justices before whom he shall be convicted think fit, instead of being subjected to any pecuniary penalty, be committed to prison for any time not exceeding two months."

(1) 1 Hagg. Con. R. 170, cited in *Ritchings* v. *Cordingley*, Law Rep. 3 A. & E. 113, 119.

(2) At p. 173.

remedy in cases of brawling and other misconduct which formerly were punishable only in the Ecclesiastical Court.

[Willes, J. No doubt this would be brawling. The only question is whether it occurred during the celebration by a clergyman of Divine service.]

A churchwarden has no more right to obstruct the clergyman in the performance of any rite or office of the church than any other member of the congregation has.

M'Intyre, Q.C. (*Coxon* with him), for the respondents. The question submitted by the magistrates is, whether the respondents have been guilty of unlawfully molesting and disturbing the appellant, "then being a clergyman in holy orders celebrating Divine service" in a certain church. The respondents are the churchwardens, and the alleged offence with which they are charged is the offering a certain amount of obstruction to the appellant whilst improperly engaged in the performance of one of the duties which the law casts upon the churchwardens. The churchwardens are the persons who have the care of the fabric and of the ornaments and utensils of the church, including the basin or bag used for the collection of the offertory or alms; it is their duty to collect the offertory, and to present it to the priest at the communion-table, where it is the duty of the latter to remain reading the offertory sentences whilst the collection is being made. To make what the respondents did an offence, it must have been done whilst the appellant was actually engaged in celebrating Divine service. And this is clearly negatived by the evidence. The clergyman cannot in any sense be said to be celebrating Divine service whilst he is doing something which he has no right to do, and which it is the proper duty of a layman to do.

[Keating, J. Supposing the clergyman to be the proper person to collect the offertory, could it be said that he was not engaged in the celebration of Divine service whilst doing so?]

To constitute an offence under this part of the section, the clergyman must be doing that which is required to be done by him only as a person in holy orders.

[Willes, J. The giving of alms is as much a part of Divine service as adoration or prayer. This is evident from the language of the prayer for the church militant,—" We humbly beseech thee most mercifully to accept our alms and oblations and to receive these our prayers which we offer unto thy Divine Majesty, beseeching thee to inspire continually the universal church with the spirit of truth, unity, and concord." I believe the clergy usually collect the offerings in cathedrals.]

It would not be the less an offertory or alms if sent to the clergyman before the commencement of the service. What the appellant was doing here he was not doing as a clergyman; he was usurping the functions of a layman. The conclusion the magistrates came to was clearly right.

Manisty, Q.C., in reply. The object of the statute was the enforcing public decency in the celebration of Divine worship.

WILLES, J. The only question for the opinion of the Court is, whether the magistrates ought to have convicted the respondents upon an information charging that they on a certain day "unlawfully did molest, let, disturb, vex, and trouble F. A. Cope, then being a clergyman in holy orders celebrating Divine service in a certain parish church of the Church of England." We are not called upon to say whether any proceeding could have been taken against the respondents for any other offence against the law,—whether the lamentable scene which took place in this church could give rise to any procedure upon that part of s. 2 of 23 & 24 Vict. c. 32 which imposes certain penalties upon "any person who shall be guilty of riotous, violent, or indecent behaviour in any cathedral church, parish church," &c.; but whether the respondents ought to have been convicted in respect of the subsequent words, "or who shall molest, let, disturb, vex, or trouble, or by any other unlawful means disquiet or misuse any preacher duly authorized to preach therein, or any clergyman in holy orders ministering or celebrating any sacrament or any Divine service, rite, or office, in any cathedral, church, or chapel, or in any churchyard or burial ground." That is a remarkable part of the section, because it draws a distinction between a person "duly authorized to preach" in the church, and "a clergyman in holy orders ministering or celebrating any sacrament or any Divine service, rite, or office" in any church. The express provision for the case of a preacher who is not strictly ministering or celebrating

1872

COPE
v.
BARBER.

any sacrament or any Divine service, rite, or office, shews that the legislature, in dealing with the case of a clergyman in holy orders, meant the latter words to apply to something in the course of being done which in its character could only be done by a clergymen in holy orders. In this case the appellant is said to have been molested whilst ministering or celebrating a rite or office. He was collecting or attempting to collect the offertory. In passing from the pulpit or the reading desk to the communion-table, the clergyman is on his way to do his duty. So, whilst returning. He is entitled to the protection of the Act whilst ministering or celebrating any rite or office or making any movement towards, in, or after such celebration. But, when he is engaged in doing a thing which is not within his duty or office as a clergyman, it is otherwise. Was, then, the collection of alms the celebrating any Divine service, rite, or office of the church? I apprehend not. The ministering of the sacrament of the Lord's Supper necessarily requires the presence of a priest. So also the rite of baptism properly, though not necessarily, for in certain cases it may be performed by a layman or a woman. In these cases, the clergyman would clearly be ministering or celebrating a sacrament or a rite within the meaning of the statute. Whether or not the collection of alms is a rite or office celebrated by a clergyman in his sacerdotal character depends upon the rubric. If that imposed upon him as part of the communion service the collection of alms, possibly the words "ministering or celebrating any sacrament or any Divine service, rite, or office," might be comprehensive enough to include it; for, as I have before observed, the offering of alms for the honour of God during Divine service is as much "celebrating Divine service" as is prayer or adoration. But the rubric imposes no such duty upon the celebrant. It excludes the notion that the priest is necessarily or even properly engaged in the collection of alms. The words are, "Whilst these sentences," i.e. the offertory sentences, "are in reading, the deacons, churchwardens, or other fit person appointed for that purpose, shall receive the alms for the poor, and other devotions of the people, in a decent basin to be provided by the parish for that purpose, and reverently bring it to the priest, who shall humbly present and place it upon the holy table." A deacon, therefore, if there be one, may properly collect the alms; if not, then they are to be collected by the churchwardens, who, though ecclesiastical officers, are regarded in law as mere laymen. The rubric goes on, "or other fit person appointed for that purpose." That clearly refers to a layman. The collection is to be made by a person of a lower degree than a priest. It required a statute to enable a deacon to perform the ceremony of marriage. (1) We are not called upon to go into the inquiry as to who is to appoint such "other fit person." We must assume that he may be appointed by the priest; and, assuming that the person appointed for that purpose is not a clergyman, it is clear to my mind that the part of s. 2 of the statute upon which this information is founded does not apply for the protection of the layman or the churchwarden. Whether or not it would protect the deacon may be a question of nicety. The rubric names a deacon as deacon and with reference to a lower grade of ecclesiastical persons, which would not include a priest, according to Lord Coke's commentary on the words of the Stat. Westm. 2, c. 41, 2 Inst. 457, "Si abbates, priores, custodes hospitalium et aliarum domorum religiosarum,"—"Seeing this Act beginneth with abbots, &c., and concludeth with other religious houses, bishops are not comprehended within this Act, for they are superior to abbots, &c., and these words [other religious houses] shall extend to houses inferior to them that were mentioned before." The rubric seems to assume that the proper place of the priest is at the communion-table, whilst the deacon might collect the offertory. It is hardly necessary to say that in this context "other fit person" would not include a priest as such. There is nothing improper in a priest,—or even a patriarch, if there were such a dignitary in our church,—making the collection. But, if he does so, he is not whilst doing it "ministering or celebrating any sacrament or any Divine service, rite, or office," but doing what may be done by a layman. The persons giving alms for pious purposes may be engaged in Divine service, but not the clergyman who collects them. I am therefore of opinion that, in what the respondents did upon this occasion, they were guilty of no offence against Mr. Cope under this part of the section, and that the magistrates were right in declining to convict.

---

(1) See per Lord Lyndhurst, C., *Reg.* v. *Millis* (10 Cl. & F. 859, 860), as to the effect of the Acts of Uniformity.

1872

COPE *v.* BARBER.

KEATING, J. I also think the magistrates were right in refusing to convict the respondents upon this information, which charges that they "unlawfully did molest, let, disturb, vex, and trouble Mr. Cope, then being a clergyman in holy orders celebrating Divine service in a certain parish church." For the reasons so amply given by my Brother Willes, which it would be idle to repeat or attempt to add to, it seems to me to be plain that the rubric never contemplated the collection of the offertory as a duty to be performed by a clergyman in holy orders. It speaks of three classes of persons who may collect, two of them lay, and one clerical, viz. a person in deacon's orders. Without deciding whether or not a priest may under certain circumstances properly collect the alms of his congregation, it is enough to say that in this case Mr. Cope was not, whilst taking upon himself that duty, "a clergyman in holy orders celebrating Divine service" in the church in question. This appeal must therefore be dismissed.

Appeal dismissed. (1)

M'Intyre, for the respondents, asked for costs.

WILLES, J., after consulting with Keating, J., said: The Court does not unanimously think that costs should be given; therefore there will be no costs.

Attorneys for appellant: *Chester & Urquhart, for Potter & Knight, Manchester.*

Attorneys for respondents: *Stephens & Stephens, for Parrott, May, & Sons, Macclesfield.*

---

(1) In the course of the argument of this case, Willes, J., desired to correct an error in the report of *Worth* v. *Terrington,* 13 M. & W. 781, 795. Counsel referring to *Jarratt* v. *Steele,* 3 Phill. 170, as an authority for saying that the churchwardens with the concurrence of the rector have authority to turn out a person for committing a trespass in the church, Parke, B., is there reported to have said: "We ought to have higher authority than the decision of Doctors' Commons for that proposition." Willes, J., said he had in his possession a letter from Lord Wensleydale, in which that learned judge declared that he had never made the observation imputed to him.

Later in the day, Lord Wensleydale's copy of 13 M. & W. was handed up to the bench by Mr. Ridley, in the margin of which were these words in his Lordship's own handwriting,—"I never said so."

BARRETT, APPELLANT; MARKHAM, RESPONDENT.

1872
June 8.

Friendly Society—Treasurer withholding Moneys of the Society—18 & 19 *Vict.* c. 63, s. 24.

To render the treasurer of a friendly society liable to the penalties imposed by s. 24 of 18 & 19 Vict. c. 63, for "withholding or misapplying" moneys of the society which have come to his hands as treasurer, it must be shewn that he has been guilty of some fraud or misrepresentation. Mere inability to pay over the money to the trustees is not enough.

CASE stated by a police magistrate, under 20 & 21 Vict. c. 43.

1. The appellant is one of the trustees of a friendly society called "The Prince of Wales Lodge, Order of Ancient Shepherds, Ashton Unity, South London District," and the respondent was, until the 28th of October last, the treasurer of that society.

2. The parties appeared before the magistrate at the Lambeth police court upon a complaint preferred by the appellant, as such trustee, under the Act to consolidate and amend the law relating to friendly societies, 18 & 19 Vict. c. 63, s. 24, in which the respondent was charged "for that, being an officer of the said friendly society, he did, having in his possession certain moneys belonging to the said society to the amount of 31*l.* 2*s.* 11½*d.*, unlawfully withhold and misapply the same." The following facts were proved:—

3. The respondent was duly appointed treasurer of the society, but had not been required to give the security directed by s. 21 of the Act. The moneys which he was charged with withholding and misapplying had been received by him in his character of treasurer for the use of the society. It was his duty to render quarterly an account of all moneys received and paid by him on account of the society, and to pay over to the trustees, on demand, the balance due from him on such account. The last account rendered by him was dated the 5th of August last; and it appeared therefrom that he was indebted to the society in the sum of 26*l.* 10*s.* 2½*d.* to that date, and from subsequent entries in the treasurer's book, further sums, making a total sum due by him to the society of 31*l.* 2*s.* 11½*d.*, the amount charged in the complaint. This sum he was unable to pay; and, as he could not give such

security for the payment as was satisfactory to the trustees, these proceedings were taken. There was no charge of fraud or misrepresentation against the respondent in respect of these moneys.

4. The magistrate held that the inability and consequent refusal of the respondent to pay the balance was not a withholding or misapplying under s. 24, and for the following reasons:—

That, although the words of s. 24 of 18 & 19 Vict. c. 63 are sufficiently general to include the treasurer; yet, having regard to the provisions of ss. 21, 22, and 23, it was not the intention of the statute that a treasurer should be dealt with under s. 24, unless some fraudulent circumstances accompanied the act with which he is charged: and fraud is not imputed to the respondent.

That these sections, 21, 22, and 23, appear to contain all that was thought necessary for the regulation of the office of treasurer, his duties and liabilities; and s. 22 expressly directs the manner in which any balance found due from him to the society shall be recovered, as also the proceeding to be taken in the case of a treasurer who detains property belonging to the society, which in the case of any other person is provided for by s. 24.

That a treasurer is not bound to account for any specific sum received by him; he may place it in his bankers' hands or elsewhere, and may use such particular money as his own, without incurring any liability beyond indebtedness; but he is required to render an account of all moneys received and payments made by him, and the balance (if any) due by him on such account becomes a debt due by him to the society.

That this relation of debtor and creditor is shewn by ss. 21, 22, and 23; and that, upon the facts proved, a treasurer cannot be said to have withheld or misapplied moneys, within the meaning of s. 24, when he merely omits to pay them over to the trustees; that the words "withhold" and "misapply," in s. 24, must apply to some specific moneys which the party holding has no right to use except for some particular purpose, and who misapplies by employing it, though without fraud, in his own business, and withholds it when he refuses to pay, though from inability, to those authorized to receive it.

That, where a debt has been created, the refusal, not a refusal to account, for the account has been justly rendered, but to pay,

1872

BARRETT v. MARKHAM.

and that from inability, is not a "withholding" within the section, nor the act whereby the inability arises a "misapplying."

That a contrary construction would encourage friendly societies to neglect those precautions which the Act has provided and required to protect their members against defalcations of their treasurers, while at the same time it would render a treasurer liable to be imprisoned for refusing to pay money which he honestly believed not to be due by him to the society.

The question for the opinion of the Court was, whether the magistrate was right in dismissing the complaint.

Oppenheim, for the appellant. The question is, whether a treasurer who withholds moneys belonging to the society can be dealt with under s. 24 of 18 & 19 Vict. c. 63, or whether the trustees are driven to seek their remedy in a county court. By s. 22 the treasurer is bound to account to the trustees for all moneys and securities which may come to his hands. Sect. 23 provides for the recovery of moneys or property of the society, where it shall be in the hands of "any person appointed or employed to or in any office in the society who shall have died or become bankrupt," &c. Then comes s. 24, which enacts that, "if any officer, member, or other person, being or representing himself to be a member of such society, &c., by false representation or imposition, shall obtain possession of any moneys, securities, &c., of such society, or, having the same in his possession, shall withhold or misapply the same, or shall wilfully apply any part of the same to purposes other than those expressed or directed in the rules of the society, or any part thereof," he may be proceeded against before a justice of the peace, who may order him to deliver up all such moneys, securities, &c., and impose a penalty not exceeding 20*l.*, with costs not exceeding 20*s.* It is true that the "treasurer" is not expressly named in that section; but the words are comprehensive enough to include him. In s. 21 he is termed an "officer" of the society. The remedy by action given by s. 22 is cumulative: *Sinden* v. *Banks.* (1) It is true that the case finds that "there was no charge of fraud or misrepresentation against the respondent in respect of these moneys;" but, to bring him

(1) 3 E. & E. 623; 30 L. J. (Q.B.) 102. 7 Jur. N.S. 910

1872

BARRETT v. MARKHAM.

within the terms of s. 24, it is enough to shew that he has "withheld or misapplied" them. In *Ex parte O'Donnell* (1), where, an officer of a friendly society who had received moneys belonging to the society having assigned his effects for the benefit of his creditors, it was sought to proceed against the assignee under s. 24, Mellor, J., says: "The facts shew that the case is not within s. 24. This is clear from that part of the section containing the penalty: as my Brother Shee pointed out, that section cannot apply to assignees who innocently, and it may be properly, receive money, but only to those cases where a person by his own act improperly obtains money, or, *having it in his possession, refuses to give it up:* then he is subject to all the penalties mentioned in that section."

John Thompson, for the respondent, was not called upon.

WILLES, J. It appears to me that the statement in par. 3 of the case, that "there was no charge of fraud or misrepresentation against the respondent in respect of these moneys," makes an end of the matter. A civil remedy having been given against a defaulting officer by s. 22, a proceeding of a criminal or penal nature is given by s. 24 in respect of something which is of a criminal character. I do not say it is necessary that the matter complained of must, to bring it within s. 24, be a thing for which an indictment would lie. I found my decision upon the language used in the beginning and at the end of s. 24. If any officer, having any moneys, securities, &c., of the society in his possession, "shall withhold or misapply the same." That clearly means a withholding or misapplying under circumstances importing misconduct. And this is confirmed by the proviso at the end of the section,—"Provided that nothing herein contained shall prevent the said society from proceeding by indictment against the said party: provided also, that no person shall be proceeded against by indictment, if a conviction shall have been previously obtained for the same offence under the provisions of this Act." It is evident that the section intended to create an offence. Fraud and misrepresentation being negatived, I think the decision of the magistrate was right.

---

(1) Law Rep. 1 Q. B. 274.

KEATING, J., concurred.

Decision affirmed.

Thompson, for the respondent, applied for costs.

WILLES, J. The respondent is, we think, entitled to costs; but they must be set off against the debt due from him to the society.

Attorney for appellant: *W. H. Fullagar.*
Attorney for respondent: *H. M. Ody.*

DE GENDRE *v.* BOGARDUS.

May 8.*

Practice—Amendment—Adding a Plaintiff—Common Law Procedure Act, 1860 (23 & 24 *Vict. c.* 126), *s.* 19.

The declaration contained two counts:—the first was for damages for breach of an agreement whereby the plaintiff let certain furniture to the defendant; and the second was for money awarded by a valuer to be paid by the defendant to the plaintiff for damage done by the defendant to the furniture. The agreement in the first count was made by C., trustee for the plaintiff (who was then a married woman), with the defendant, and the plaintiff was not a party to it; but she was a party to the submission to arbitration on which the second count was founded, and C. was not. The plaintiff having obtained an order by the Master, under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 34, to add C. as a plaintiff:—

Held, that the Master had power to make the order, and that he had properly exercised his discretion in making it.

THE declaration contained two counts, the first upon an agreement charging the defendant with having damaged furniture let to him by the plaintiff with a house, the second upon an award made in respect of the same claim by a valuer upon a submission to arbitration made by the plaintiff and the defendant. The writ was served upon the defendant on the 4th of November, 1871; the declaration was delivered on the 16th, the plaintiff's attorneys having in the mean time received notice that the action was commenced in the name of a wrong plaintiff, the agreement for letting having been made by Newton Crossland as trustee for Madame de Gendre, the plaintiff. On the 30th of November the defendant, who was a Peruvian, delivered his pleas, and shortly afterwards he sailed for Peru, where he still remained.

---

* Decided in Easter Term.

On the 6th of December, the plaintiff took out a summons for leave to amend her declaration by *substituting* Newton Crossland as the plaintiff. This summons having been dismissed, another was taken out for leave to *add* Crossland as a plaintiff on the record. Upon this summons Master Kay made an order; and upon appeal to Byles, J., that learned judge indorsed the summons, "No order; but without prejudice to an application to the Court."

T. S. Pritchard moved for a rule to set aside the order of Master Kay. The master had no jurisdiction to add a plaintiff; and, if he had, the circumstances were not such as to warrant its exercise. The real object of the plaintiff, no doubt, is, to add Crossland as a plaintiff, and then at the trial to strike out the name of De Gendre, and thus to do indirectly what the Common Law Procedure Acts do not permit to be done directly.

[Grove, J., referred to *Blake* v. *Done*. (1)]

That turned upon s. 222 of the Common Law Procedure Act, 1852, and was disapproved of or at all events distinguished by this Court in *Garrard* v. *Giubilei*. (2) Reliance will be placed upon s. 34. (3) But here it is sought to make this a different action altogether.

[Bovill, C.J. I see no objection to adding a plaintiff, under s. 19 (4) of the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126.]

---

(1) 7 H. & N. 465; 31 L. J. (Ex.) 100. 7 Jur. N.S. 1306

(2) 11 C. B. (N.S.) 616; 31 L. J. (C.P.) 131; in error, 13 C. B. (N.S.) 832; 31 L. J. (C.P.) 270. 8 Jur. N.S. 5 L.T. 677

(3) 15 & 16 Vict c. 76, s. 34, "It shall be lawful for the Court or a judge, at any time before the trial of any cause, to order that any person or persons not joined as plaintiff or plaintiffs in such cause shall be so joined, or that any person or persons originally joined as plaintiff or plaintiffs shall be struck out from such cause, if it shall appear to such Court or judge that injustice will not be done by such amendment," &c.

(4) 23 & 24 Vict. c. 126, s. 19, "The joinder of too many plaintiffs shall not be fatal; but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist; and judgment may be given in favour of the plaintiffs by whom the action is brought, or of one or more of them, or, in case of any question of misjoinder being raised, then in favour of such one or more of them as shall be adjudged by the Court to be entitled to recover: Provided always that the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any person or persons in whose favour judgment is not given, unless otherwise ordered by the Court or a judge."

That is, provided it be not inconsistent with the cause of action as alleged: *Bellingham* v. *Clark.* (1) The plaintiff having deliberately and intentionally brought the action in the name of the wrong plaintiff, the Court will not now help her.

A. L. Smith shewed cause in the first instance. If the plaintiff were now commencing the action, there could be no objection to her joining Crossland as a co-plaintiff; and, if it should turn out that one plaintiff alone was entitled to recover upon one count, and the other plaintiff upon the other count, the only consequence would be that they would be put to their election at the trial, and there might be a verdict for one plaintiff upon one count and a verdict for the defendant upon the other count. No injustice, therefore, can be done by the amendment being allowed; but, on the contrary, injustice would be done to the plaintiff by refusing it, inasmuch as she would find a difficulty in serving a new writ upon the defendant.

Pritchard, in support of the rule. It is manifestly contrary to the spirit of the Common Law Procedure Acts to allow two causes of action to be joined in this manner. The 19th section of the Common Law Procedure Act, 1860, applies to cases where all the plaintiffs sue in one and the same right. In Lush's Practice, 3rd ed. 28, it is said (2): "This provision applies only where the legal right may be supposed to exist in all the plaintiffs jointly, and not where the question is in which one it exists exclusively of the others; nor where it exists in one of the plaintiffs and some other person not a party."

BOVILL, C.J. The object of many of the provisions of the Common Law Procedure Acts was to prevent the miscarriage of justice at the trial by reason of variances and other technical difficulties which are beside the real merits of the case. Amongst others is s. 34 of the Act of 1852 (15 & 16 Vict. c. 76), the effect of which is to get rid of the difficulty where a sufficient number of persons are not joined as plaintiffs. The effect of there being too many plaintiffs is disposed of by s. 19 of the Act of 1860

---

(1) 1 B. & S. 332, and see *Stubs* v. *Stubs*, 1 H. & C. 257; 31 L. J. (Ex.) 510.

(2) Citing *Bellingham* v. *Clarke*, 1 B. & S. 332, and *Stubs* v. *Stubs*, 1 H. & C. 265; 31 L. J. (Ex.) 510.

1872

DE GENDRE v. BOGARDUS.

(23 & 24 Vict. c. 126), which enacts that "the joinder of too many plaintiffs shall not be fatal; but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist; and judgment may be given in favour of the plaintiffs by whom the action is brought, or of one or more of them, or, in case of any question of misjoinder being raised, then in favour of such one or more of them as shall be adjudged by the Court to be entitled to recover: Provided always that the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any person or persons in whose favour judgment is not given, unless otherwise ordered by the Court or a judge." The effect of that section is, that, if too many plaintiffs are joined, the judgment may be in favour of one or more, at the election of the plaintiffs; and the proviso as to costs sufficiently protects the defendant from having too many plaintiffs vexatiously put upon the record. In this case, therefore, there was nothing to prevent the now plaintiff and Crossland from joining in the action originally, or now from bringing a fresh action in the names of both. It was contended for the defendant that s. 19 of the Act of 1860 does not apply, because it was only intended to operate upon cases where the legal right was originally erroneously supposed to be in two plaintiffs, whereas here there can be but one cause of action as to each of these two persons. If that had been the intention of the section, one would have expected to find words so to limit it. The proviso was thought sufficient to prevent several persons from being joined as plaintiffs where the causes of action are separate; for, the judge would, no doubt, leave the costs of the unsuccessful plaintiff to be borne by himself. No one would bring an action at that risk: and, if such an action were brought, the Court would find some means of exercising a control over the proceedings. If the construction of the section which I adopt be the correct one, and the two plaintiffs could now commence an action against the defendant, serving him with process abroad, what would be the effect of the amendment here sought? Simply to prevent the expense of the present action being thrown away and further needless expense being incurred. And, as far as my experience goes, it has always been the practice of the Court to exercise its powers of amendment in order to prevent useless expense. The

power to join parties under s. 34 of the Act of 1852 is clear, and the question is simply one of discretion. The circumstances here are extremely peculiar: and, upon the whole, I think the master had power to make the order he did, and exercised a proper discretion. I think there should be no rule; but, as the costs of the application are in our discretion, and the appeal to the Court was rather encouraged by my Brother Byles, I think there should be no costs.

Brett, J. I must confess that I have entertained considerable doubt in this case; but, upon the whole, I cannot see that the master has done wrong. The application was, to add a plaintiff under s. 34 of the Common Law Procedure Act, 1852. I think the master had jurisdiction to entertain it. At first Mr. Pritchard was under an impression that the declaration contained only one count, viz. upon the agreement. If that had been the case, the agreement having been made with Crossland, if the plaintiff had been allowed to add that gentleman as a co-plaintiff, it is clear that another amendment would have been required at the trial; so that we should have been asked to make one amendment, with a certainty that another amendment must be asked for at a subsequent period, viz. to strike out the other plaintiff. This would in effect have been asking us to do indirectly that which the legislature had advisedly declined to give us power to do, viz. to substitute one plaintiff for another upon the record: and in that case I certainly should have thought that the order ought not to have been made. But it now appears that there is a second count in the declaration,—a count upon an award. The only consequence, therefore, of our refusing to sanction this amendment will be that the plaintiff must discontinue the present action and bring a new one in the names of herself and Crossland, alleging an agreement with both, and a submission and award with both. No objection could be made to that. Assume that it turned out at the trial that the agreement was with one plaintiff and the submission to arbitration with the other, the result would be that the two plaintiffs could not succeed upon both or either of the counts; but that they would be put to their election, and the judge would direct a verdict for one plaintiff upon one count, and for the defendant upon the other. No amendment would be necessary; but what I have suggested would necessarily result from s. 19 of the Common Law Procedure Act, 1860, and the defendant would have costs as against both as to that part of the record which was found in his favour, and probably also his whole costs as against the unsuccessful plaintiff. The plaintiff, therefore, is not now asking us to do as I at first thought; and, upon the whole, it appears to me that, if we were to grant this rule, it would not prevent the plaintiff from doing what she seeks to do, but only making her do it at an increased expense. Upon that ground alone I concur with my Lord in thinking that the master was not wrong in making this order.

Grove, J. I also have entertained some doubt in this case; but that which has ultimately prevailed on my mind is that, if this rule were made absolute, the only effect would be that the plaintiff would have to discontinue the present action, and bring a fresh one in the names of herself and Crossland. I abstain from giving any opinion as to the consequences which would result from joining two plaintiffs each having a different cause of action, inasmuch as I do not at present quite see what those consequences would be. It will be enough to decide that point when it comes before us. I agree that this rule should be refused simply upon the ground that the same effect which the plaintiff sought by the amendment ordered by the master could be obtained in another way, at a considerable increase of costs, and without benefit to either party,—especially as, the plaintiff being out of the kingdom, there would be a difficulty in serving him with a fresh writ. If this rule were granted, it would probably be only upon the terms of the defendant's accepting service of the writ in the new action.

Rule refused.

Attorneys for plaintiff: *Ellis & Crossland.*
Attorney for defendant: *Scarborough.*

BAYLEY *v.* THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY.

1872
July 5.

Master and Servant—Railway Company —Responsibility of for Act of Servant—Scope of Employment.

8 CP 565
9 CP 576

A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances which arise, when an act of that class is to be done, and trusts him for the manner in which it is done; consequently he is answerable for the wrong of the person so intrusted, either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done, provided that what is done is not done from any caprice of the servant, but in the course of the employment.

The plaintiff, a passenger on the defendants' line of railway, sustained injuries in consequence of being violently pulled out of a railway carriage by one of the defendants' porters, who acted under an erroneous impression that the plaintiff was in the wrong carriage. The defendants' bye-laws did not expressly authorize the company's servants to remove any person being in a wrong carriage, but they provided that no person should be allowed to enter any carriage or to travel therein without having first paid his fare and taken a ticket. They likewise provided that the porters should act under the orders of the station-master, &c., and do all in their power to promote the comfort of the passengers and the interests of the company:—

Held, that the act of the porter in pulling the plaintiff out of the carriage was an act done within the course of his employment as the defendants' servant, and one for which they were therefore responsible.

Affirmed L.R. 8 C.P. 148

DECLARATION: 1st count for an assault; 2nd count for improper and negligent conduct towards the plaintiff when a passenger on the defendants' railway, on the part of the defendants' servants, by pulling the plaintiff out of a carriage, whereby he sustained various injuries.

Plea: Not guilty. Issue thereon.

At the trial before Channell, B., at the Chester Assizes, the facts appeared to be as follows:—The plaintiff had taken a ticket from Guide Bridge, the station at which the occurrence which gave rise to the action took place, for Macclesfield, and had taken his seat in a train for the purpose of proceeding to his destination. Just before the train started he inquired of a porter whether he was in the proper train for Macclesfield. The porter supposed he was not, and said that he was in the wrong train and must come out, and just as the train was getting in motion he violently pulled

1872

BAYLEY
v.
MANCHESTER,
SHEFFIELD,
AND
LINCOLNSHIRE
RAILWAY CO.

him out, and both falling on the platform the plaintiff received the injuries complained of. The plaintiff was in fact in the right carriage.

The bye-laws of the company provided that the porters should act under the orders of the clerks in charge, station-masters, station inspectors, and foremen; that they should do the work, and attend to whatever business they might have assigned to them, exerting themselves for the good order, regularity, and cleanliness of the trains and stations where they might be placed, and do all in their power to promote the comfort of the passengers and the interests of the company.

The bye-laws also provided that no passenger should be allowed to enter any carriage on the railway, or to travel therein upon the railway, without having first paid his fare and obtained a ticket, and also if a guard had any reason to believe that a passenger was not in the proper carriage he might request him to shew his ticket, for the purpose of having any irregularity corrected, and excess fare paid, if any due. They also provided that a person insisting on smoking in a non-smoking carriage, or intoxicated, might be removed from the carriage; but they did not expressly provide that a passenger might be removed when in a wrong carriage.

On these facts the verdict was entered for the plaintiff for 200*l.*, the damages found by the jury, leave being reserved to the defendants to move to enter a nonsuit, on the ground that they were not responsible, under the circumstances, for the wilful and unauthorized act of the porter, as not being within the scope of his employment, and that there was no evidence of liability.

A rule nisi was accordingly obtained, against which

June 19. *McIntyre, Q.C.*, shewed cause. The act of the porter in dragging the plaintiff out of the carriage was an act done by him within the scope of his employment, and one therefore fo which the defendants are responsible. It is true that the plaintiff was not in the wrong carriage, but the porter thought he was, and intended to remove him in pursuance of his supposed authority to prevent passengers from being in the wrong carriages.

[WILLES, J. This is not like the case of *Lyons* v. *Martin* (1), where the act was a wilfully illegal act, wholly without the scope of the employment. It cannot be that, two men being in the same carriage, such carriage being right for one and wrong for the other, and both being violently pulled out and injured like the present plaintiff, the one in the wrong carriage may maintain his action, and the one in the right carriage cannot.]

---

(1) 8 A. & E. 513.

Limpus v. *London General Omnibus Co.* (1) is directly in point. There the act done was in contravention of the express instructions of the defendants. See also *Seymour* v. *Greenwood.* (2)

Horatio Lloyd (*Hughes* with him) supported the rule. It cannot be within the scope of a porter's duty to remove a person from the right carriage. The bye-laws of the company give no instructions to the company's servants to remove passengers, except in two cases, viz., where a passenger insists on smoking or is intoxicated. If a person is supposed to be in a wrong carriage, he can only be requested to shew his ticket, so that any irregularity may be corrected, and excess fare paid.

[WILLES, J. Surely there must be authority to remove in various other cases than those of smoking and intoxication. Suppose, for instance, a passenger begins cutting the linings or otherwise damaging the carriage. If a man were in a carriage without a ticket, and refused to come out, would there not be authority to treat him as a trespasser and pull him out, using no more force than necessary?]

No such power is expressly given to the company's servants, and it is submitted that it cannot be implied. The case of *Limpus* v. *London General Omnibus Co.* (1) is distinguishable. In that case Wightman, J., dissented, and Crompton, J., seems to have doubted considerably. Under these circumstances the doctrine of the case is hardly one to be extended. The acts there done were done for the benefit of the defendants in the course of a competition between the defendants and others, and constituted a mode of doing what the defendants' servant was employed to do. Obviously a master cannot, by general instructions as to the mode of doing the act authorized, such as to drive carefully and so forth, exonerate himself from the consequences of his servant's negligence or improper conduct in doing such act. Here the porter was doing that which he had no authority whatever to do. In *Seymour* v. *Greenwood* (1) the servant was acting within the scope of his authority in doing the act complained of, though he did it violently and recklessly.

---

(1) 1 H. & C. 526; 32 L. J. (Ex.) 34.

(2) 6 H. & N. 359; 7 H. & N. 355; 30 L. J. (Ex.) 189, 327.

They also cited *Allen* v. *South Western Ry. Co.* (2), *Walker* v. *South Eastern Ry. Co.* (3), *Roe* v. *Birkenhead, &c., Ry. Co.* (4), *Poulton* v. *South Western Ry. Co.* (5), *Goff* v. *Great Northern Ry. Co.* (6), *Edwards* v. *North Western Ry. Co.* (7), *McKenzie* v. *McLeod.* (8)

Cur adv. vult.

July 5. The judgment of the Court (Willes, Keating, and Byles, JJ.) was delivered by

WILLES, J. This was a rule to enter a nonsuit. The action was for an assault committed upon the plaintiff by a porter in the employment of the defendants, who wrongfully removed the plaintiff from a railway carriage. No objection was raised as to the form of action. The jury found for the plaintiff; and the question is whether there was evidence upon which the jury might lawfully find such an authority to the porter as would make the defendants liable.

The plaintiff, having his ticket, and being in a carriage on the line, inquired of the porter whether he was in the proper train for his destination. The porter fancied that he was not, and so informed him; and, the train having either started or being about to start, the porter pulled the plaintiff out of the carriage, and in so doing seriously hurt him. In fact the porter was wrong, and the plaintiff was in the right carriage. The porter, in order to exculpate the company, contradicted the plaintiff's statement, and also said that he had no authority to do what was alleged. The jury, however, disbelieved him, and believed the plaintiff; and the leave reserved is founded upon his evidence.

---

(1) 6 H. & N. 359; 7 H. & N. 355; 30 L. J. (Ex.) 189, 327.
(2) Law Rep. 6 Q. B. 65.
(3) Law Rep. 5 C. P. 640.
(4) 7 Ex. 36.
(5) Law Rep. 2 Q. B. 534.
(6) 3 E. & E. 672; 30 L. J. (Q.B.) 148. 7 Jur N.S. 756
(7) Law Rep. 5 C. P. 445.
(8) 10 Bing. 385.

Evidence was given of the rules of the company as to the employment of their servants. The general rule relating to porters was the following:—"92. Porters are to act under the orders of the clerks in charge, station-masters, station-inspectors, and foremen. They are to do the work and attend to whatever business they may have assigned to them, exerting themselves for the good order, regularity, and cleanliness of the trains and stations where they are placed, and do all in their power *to promote the comfort of the passengers and the interests of the company.*"

By the bye-law 1, "No passenger will be *allowed* to enter any carriage on the railway, or to travel therein upon the railway, without having first paid his fare and obtained a ticket," &c.: and then follow regulations for the production of the ticket.

It was argued that there was nothing in the rules or bye-laws to give a power of removal; but, who is to prevent the passenger in a wrong carriage from being "allowed to travel therein upon the railway"? Can no officer remove him? The same question might arise as to a person trespassing upon the railway: and, upon the question being put during the argument to counsel for the company, who is to remove such a trespasser, the answer was, "Send for a policeman." That policeman, however, would have no more power than the porter; indeed, not so much; for, against wilful trespassers, the porter would have a power of removal under the Act for regulating railways. (1) If the rules do not impliedly give such a power, which it seems they do, it is at least a question for the jury whether a porter, who is to turn his hand to anything, exercising upon a railway, in the supposed "interests of the company," the power of removing a passenger from the train, did so under a general authority to remove trespassers.

If the jury find in the affirmative, then the company are liable for an abuse of the authority. It is not sufficient, in order to excuse a master, to shew that the particular act was wrongful, or even that the servant was warned not to do what was wrong. In any case of collision in which the master takes no part, he has his remedy against the servant for misconduct and breach of authority as between them, although a third person injured by the wrongful manner of an act done by the servant in the course of his employ-

---

(1) 3 & 4 Vict. c. 97, s. 16.

1872

BAYLEY v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO.

ment, has his remedy against both the servant and the master. A person who puts another in his place to do a class of acts in his absence, necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so intrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from any caprice of the servant, but in the course of the employment. The authorities are collected in the case of *The Thetis.* (1)

The case of *Lyons* v. *Martin* (2) was relied upon for the defendants as furnishing an appropriate illustration. There, the master was held not answerable for the act of a servant employed to impound sheep found upon his master's land, but who thought proper to impound sheep found upon a highway out of the land. If he had improperly impounded sheep found upon his master's land, the decision would have been different.

This comparison of passengers to trespassers or supposed trespassers in the form of sheep or otherwise, does not, however, justly represent their condition. They are for valuable consideration entitled to use the company's line, and to be waited upon by the company's servants on their way. And it did sound startling to hear it argued that because of this right, and because of its being wrong to interfere with or injure them, an act done by a servant of the company, though of a class authorized as against a trespasser, gives no remedy to a person in the right. If a porter roughly and negligently shewing or helping a passenger into a carriage were to mislead or injure him, he would be acting in the course of his employment within the scope of rule 92, and the company would be liable; and why not for the passenger's being by the same servant acting in the supposed interest of the company roughly and negligently put out of a carriage where he was entitled to be? The distinction would be a refinement for which the law as yet furnishes no precedent.

There was evidence of an authority to remove a person in a wrong carriage abused by a blundering servant of the company in pulling the plaintiff out of the right one, in the supposed "interest

---

(1) Law Rep. 2 A. & E. 365.

(2) 8 Ad. & E. 512.

1872

BAYLEY
v.
MANCHESTER,
SHEFFIELD,
AND
LINCOLNSHIRE
RAILWAY CO.

of the company;" and the rule to enter a nonsuit ought to be discharged.

Rule discharged.

Attorneys for plaintiff: *Lewis & Sons, for Higginbotham & Barclay.*

Attorneys for defendants: *Cunliffe & Beaumont.*

June 7.

STANTON *v.* RICHARDSON.
RICHARDSON *v.* STANTON.

Ship and Shipping—Charterparty—Warranty of Seaworthiness—Condition Precedent—Ship unfit for Cargo—Obligation of Shipowner.

3 Asp. 564
10 C.P. 2
[illegible]B.D. 381

A charterparty provided that the ship should load a full and complete cargo of sugar in bags, hemp in compressed bales, and/or measurement goods. It likewise specified different rates of freight for dry and wet sugar. The ship proceeded to her port of loading, where a cargo of wet sugar was provided for her by the charterer. A great deal of moisture drains from wet sugar, and when the cargo had been nearly all shipped it was found that there was such an accumulation of molasses in the hold—the result of drainage from the sugar—that the ship would not be seaworthy for the voyage if she proceeded in her then condition. Owing to the nature of the material and the depth of the hold, the ship's pumps were unable to clear the ship of the drainage from the sugar. The ship was perfectly seaworthy except with respect to this particular cargo, and the pumps were quite sufficient for all ordinary purposes. The sugar had to be unloaded again, and the charterer then refused to reload it or to provide any other cargo. Cross actions were brought—the one by the shipowner against the charterer for refusing to provide a cargo, and the other by the charterer against the shipowner to recover damages by reason of the ship not being fit to carry the cargo provided for her.

At the trial the jury, in answer to questions left to them by the judge, found that the cargo of sugar which was offered was a reasonable cargo to be offered that the ship was not reasonably fit to carry a reasonable cargo of wet sugar that the ship could not have been made fit within such a time as would not have frustrated the object of the adventure; and that the ship would not, without new pumps, and with a reasonable cargo of wet sugar on board, have been seaworthy:—

Held, that the shipowner, by entering into the charterparty, undertook that the ship should be reasonably fit for the carriage of a reasonable cargo of any of the kinds of goods specified in the charterparty, and consequently of a reasonable cargo of wet sugar; and that, upon the findings of the jury that she was not so fit, and could not be made so in such a time as not to frustrate the object of the voyage, the charterer was entitled to succeed in both actions.

Affirmed in Ex Ch L.R. 9 C.P. 390 & in H of L [illegible]

CROSS actions upon a charterparty between the owner and the charterer of a ship called the *Isle of Wight.*

1872

STANTON v. RICHARDSON.

RICHARDSON v. STANTON.

The first count of the declaration in the action by the shipowner against the charterer (*Stanton* v. *Richardson*) set out the terms of the charterparty, and alleged as breaches that the defendant neglected and refused to load a full and complete cargo on board the ship, and that he neglected and refused to pay the freight. The second count alleged as a breach of the charterparty that the defendant loaded a large portion of the cargo, to wit, sugar in bags, and the same was afterwards properly and necessarily for the safety of the ship and cargo landed by the master at the port of lading, on account of a part thereof being in a damaged state in the hold of the vessel, and that all conditions were performed, &c., necessary to entitle the plaintiff to reload the said portion of the said cargo, and to have the residue of the cargo supplied; yet the defendant refused to allow the said portion to be reloaded and to supply the residue. The third count was similar to the second. The fourth count alleged as a breach of the charterparty that, though a large portion of the cargo, consisting of sugar in bags, was loaded on board the ship by the defendant, a portion of it was in such a bad, dangerous, and unfit state for conveyance in the ship that the same damaged and injured the ship and her pumps, and also the residue of the sugar, so that the ship could not safely set sail and proceed on her voyage, whereby, &c. Fifth, money counts.

The pleas were the ordinary traverses of the allegations of the declaration, &c., with the exception of the third plea, which alleged that the vessel was not tight, staunch, and strong, or fit to receive and carry a cargo as she was required to be according to the true intent and meaning of the charterparty, and that the defendant could not, although he was ready and willing so to do, safely or securely load on board the ship a full and complete, or any cargo; and by reason of the condition of the ship was prevented from deriving any benefit from the charterparty, and the consideration for the same wholly failed.

Issues.

In the action by the charterer against the shipowner (*Richardson* v. *Stanton*) the first count of the declaration set out the charterparty, and alleged as a breach that the master did not take all proper means to keep the ship tight, staunch, and strong, well manned and sound, and in every way fitted for the voyage; and that the ship at the time of receiving the cargo on board was not a good risk for insurance, and did not load or carry a full and complete, or any cargo, according to the charterparty, whereby the plaintiff lost the benefit of the charter, and was put to great expense in landing the cargo and warehousing the same, and was compelled to ship the cargo by another vessel; and a portion of the cargo which had been loaded on board the ship was either wholly lost or much damaged and injured, &c. Second and third counts respectively alleged bailments of certain goods to defendant for carriage in his ship, and damage to the goods through the negligence of the defendant and his servants, and through the defective and unseaworthy condition of the defendant's ship. Fourth, money counts.

Pleas: The ordinary traverses, &c.

Issues.

The charterparty, so far as material, was as follows: it was therein agreed between the master of the ship called the *Isle of Wight*, for and on behalf of himself and the owner of the said vessel of the one part, and the Borneo Company, Limited, as agents for and on behalf of the charterer, of the other part, that the said master should, after having discharged his inward cargo with all proper despatch, "sail for Manilla, or as near thereunto as he might safely get, for orders to load within there or at Yloilo or at Zebu, the following cargo of lawful merchandise, &c.: a full and complete cargo of sugar in bags, hemp in compressed bales, $^{\text{and}}_{\text{or}}$ measurement goods, always sufficient dead weight to ballast the vessel;" and that the vessel, being so loaded, should sail to Cork or Falmouth for orders to discharge in a port in the United Kingdom or in Europe, between Havre and Hamburg. The provisions concerning rate of freight specified that the rate should be 4*l.* 2*s.* 6*d.* for dry sugar, 4*l.* 5*s.* for wet sugar, and 4*l.* 15*s.* for hemp and measurement goods. The charter did not commence with the usual clause as to the vessel's being tight, staunch, and strong, but contained this provision: "The master engages that the vessel, before and when receiving cargo, shall be a good risk for insurance; and he will, when required, provide a survey report declaring her to be so; and during the voyage the master shall take all proper means to keep the vessel tight, staunch, and strong,

1872

STANTON v. RICHARDSON. RICHARDSON v. STANTON.

well manned and provided, and in every way fitted and provided for the voyage."

At the trial before Brett, J., at the sittings in London after Hilary Term, the facts were as follows:—The *Isle of Wight* proceeded to Manilla, and thence, in accordance with orders given by the charterer's agents, to Yloilo, which is in the Philippine Isles. At Yloilo she was surveyed, in pursuance of the terms of the charterparty, and reported to be a first-class risk and fit to carry a dry and perishable cargo to any part of the world. A cargo of what is known as wet sugar, in bags, was provided for her by the charterer. It appears that a very large quantity of moisture drains from cargoes of wet sugar, and when the bulk of the cargo had been loaded it was found that there was such a large accumulation of molasses in the hold, the result of drainage from the sugar, that the ship would not be seaworthy for the voyage if she proceeded in her then condition. An attempt was made to get rid of the drainage by means of the ship's pumps. The pumps were of the usual kind for a ship of the size of the *Isle of Wight*, and quite sufficient for ordinary purposes, but, owing to the depth of the ship's hold, and the nature of the material, they were unable to deal with the drainage from the sugar. The ship was perfectly seaworthy, excepting with respect to this particular cargo of wet sugar and the insufficiency of the pumps to deal with it. It ultimately became necessary to unload the cargo again and warehouse it at Yloilo, whence it was afterwards, by arrangement between the parties, sent to Europe in another ship called the *Milton*. The charterer refused to provide another cargo. It appeared that there was no means of procuring any other pumps for the purpose of pumping out the drainage from the sugar except by sending for them to Manilla, and it would have taken a very considerable period—probably seven or eight months—before they could be so procured.

The following were the questions left to the jury, and the answers given by the jury to them:—1. Did the charterer in the first place offer a full cargo?—Yes. 2. Did the charterer refuse to allow the cargo to be reshipped, or any cargo, after the first was discharged, to be shipped and carried in the *Isle of Wight*?—Yes. 3. Was the cargo shipped on board the *Milton* by mutual consent?—Yes.

1872

STANTON *v.* RICHARDSON. RICHARDSON *v.* STANTON.

4. Was the sugar which was offered to the captain a reasonable cargo to be offered?—Yes. 5. If not, was the defect such, and so apparent, that a captain of ordinary care and skill, if he meant to object to it, ought to have rejected it?—No. 6. Was the ship fit to carry the cargo which was offered to her?—No. 7. Was the ship reasonably fit to carry a reasonable cargo of Yloilo wet sugar?—No. 8. Did the captain use reasonable skill and care in the treatment of the cargo delivered to him?—No. 9. Was the damage suffered by the sugar the result of its own defective condition, without any defect in the ship or any fault of the captain?—No. 10. Was the damage to the sugar caused by the unfitness of the ship to carry the cargo offered to her, or by the ship being unreasonably unfit to carry a reasonable cargo of Yloilo wet sugar, or by want of reasonable care or skill of the captain in treating the cargo delivered to him?—Yes. 11. If the ship was defective, was the captain willing and able to make her fit within a reasonable time?—Willing, but not able.—12. Was he willing and able to make her fit within such a time as would not have frustrated the object of the adventure?—Willing, but not able. 13. Would the ship, without new pumps, and having the sugar which was offered to her on board, have been seaworthy?—No. 14. Would the ship, without new pumps, and with a reasonable cargo of Yloilo sugar on board, have been seaworthy?—No.

Upon these findings the learned judge directed the verdict to be entered for the charterer in both actions, and reserved leave to the shipowner to move to enter a verdict, the Court to be at liberty to make all amendments that the judge ought to have made. It was agreed that the damages in both actions should be referred.

A rule nisi was obtained to enter the verdict pursuant to the leave reserved, on the ground that Richardson, the charterer, had no right to throw up the charterparty and refuse to load a cargo, and that, upon the findings of the jury, Stanton, the shipowner, was entitled to have the verdict entered for him, and also for a new trial on the ground of misdirection on the part of the judge in directing a verdict to be entered for Richardson upon the findings of the jury, and in telling the jury that there was a warranty on the part of the shipowner that the ship was fit to carry a reasonable cargo of Yloilo wet sugar, and that there was an obligation on the part of the ship-

1872

STANTON v. RICHARDSON.
RICHARDSON v. STANTON.

owner and master of the ship to have the ship in a state fit for such a cargo, and that the master should possess the necessary knowledge enabling him to deal with and manage such a cargo, and in telling the jury that the shipowner was bound within a reasonable time to make the ship fit to take such a cargo, and to do so within such a time as would not frustrate the objects of the adventure, or upon the ground that the verdicts were against the weight of the evidence—first, in the answers given by the jury to the 6th, 7th, and 14th questions; secondly, in the answers to the 8th, 9th, and 10th questions; and thirdly, in the answers to the 11th and 12th questions.

Sir J. Karslake, Q.C., Butt, Q.C., and *J. C. Mathew,* shewed cause. The charterparty clearly specifies wet sugar as one of the kinds of cargo which may be loaded under it. The jury have found that the cargo offered was a reasonable one. It is contended that the shipowner is bound to provide a ship reasonably fit for the purpose of carrying any of the specified cargoes which he has undertaken to carry, and the charterer is under no obligation to provide a cargo of the sorts specified which may be suitable to the particular ship. It must be admitted that compliance with a warranty is not always and in all cases a condition precedent; but here the jury have found that the objects of the voyage were wholly frustrated. The cases establish that when the defect in the ship or the breach of contract on the shipowner's part goes to the whole consideration there is an answer to an action for refusing to load: *Tarrabochia* v. *Hickie* (1); *Behn* v. *Burness* (2); *McAndrew* v. *Chapple.* (3) There is an express condition in this charterparty that the ship shall be a good risk for insurance at the time of receiving the cargo; this shews that it was intended that the vessel should be seaworthy with regard to the particular cargoes specified. Apart from this there would be a warranty of seaworthiness in respect of the cargoes specified in the charter. The shipowner relies on the analogy of a specific chattel purchased, as to which it is not a condition precedent that it shall be fit for a particular purpose. That is not a true analogy; the case more

---

(1) 1 H. & N. 183; 26 L. J. (Ex.) 26.

(2) 3 B. & S. 751; 32 L. J. (Q.B.) 204.

(3) Law Rep. 1 C. P. 643.

8 Jur N.S. 358 [illegible]

1872

STANTON
v.
RICHARDSON.
RICHARDSON
v.
STANTON.

nearly resembles that of a contract to provide goods which shall answer a certain description and be fit for a certain purpose: see *Brown* v. *Edgington* (1); *Shepherd* v. *Pybus* (2); *Jones* v. *Just.* (3)

It may be difficult to find any distinct statement in the text books that the ship at the time of loading must be fit to receive the particular cargo specified in the charter, but it is clear that the shipowner's liability goes even further than that. See the observations of Blackburn, J., in *Redhead* v. *Midland Ry. Co.* (4) The distinction was drawn in that case between carriers by land and by sea, and Lush, J., at p. 418, says, "as to shipowners, I agree that there is abundant authority for the doctrine laid down." It cannot be that the charterer is bound to load a cargo on board a ship that is unseaworthy or not fit to receive it, as, for instance, to put silk into a ship that is leaky. Therefore the charterer here was not bound to load, or, the cargo having been unloaded, to reload while the ship was in her then state; and as the jury have found that she could not have been fitted to receive the cargo in such time as not to totally frustrate the objects of the voyage he was absolved from the obligation to provide a cargo altogether, and was entitled to recover damages for the breach of contract on the part of the shipowner.

They also cited Bell's Commentaries on the Laws of Scotland, s. 499; Pothier, Chartepartie, 30; Parsons on Shipping, 285; *Thompson* v. *Gillespy* (5); *Burgess* v. *Wickham* (6); *Knill* v. *Hooper* (7); *Towse* v. *Henderson* (8); *Lyon* v. *Mells* (9); *Gibson* v. *Small* (10); Abbott on Shipping, 5th ed. p. 218, 10th ed., by Shee, 254; *Freeman* v. *Taylor* (11); *Clipsham* v. *Vertue.* (12)

Henry James, Q.C., Watkin Williams, and *Cohen,* supported the rule. The first question is whether the shipowner was bound to provide a ship fit to carry such a cargo as was offered. The

---

(1) 2 Man. & G. 279.

(2) 4 Scott, N. R. 434.

(3) Law Rep. 3 Q. B. 197.

(4) Law Rep. 2 Q. B. 433–437.

(5) 5 E. & B. 209.

(6) 3 B. & S. 669; 33 L. J. (Q.B.) 17. 10 Jur. N.S. 93

(7) 2 H. & N. 277; 26 L J. (Ex.) 377.

(8) 4 Ex. 890; 19 L. J. (Ex.) 163.

(9) 5 East, 427.

(10) 4 H. L. 353. 17 Jur. [illegible]

(11) 8 Bing. 124.

(12) 5 Q. B. 265; 13 L. J. (Q.B.) 2.

1872

STANTON
v.
RICHARDSON.
RICHARDSON
v.
STANTON.

jury have not found that the cargo was a reasonable cargo in relation to this particular ship. The ship was perfectly seaworthy in the ordinary sense of the term, and could have carried any ordinary cargo. The pumps were in good order and fit for ordinary purposes. It is contended that the shipowner was not bound to alter the construction of the ship in order to take one particular sort of cargo for which she was not adapted. The charterparty specifies that the charterer may load various cargoes of lawful merchandise; that must be taken to mean of a kind suitable to the ship. The charterer must be taken to know what the nature of a cargo of wet sugar is, and may satisfy himself if he will whether the ship is suitable for carrying such a cargo before he charters her. He is not entitled to throw on the shipowner the necessity of altering the construction of the vessel to take a cargo of an exceptional character, the peculiar nature of which the shipowner is not likely to know when he enters into the contract. The specification of the cargo in a charterparty must be taken to refer to a cargo of an ordinary description. Suppose the charter specified a cargo of machinery, would the charterer be entitled to tender a cargo consisting of pieces of machinery of enormous size which could not be got into the hold without altering the construction of the ship? The charterer is bound to supply a cargo within the terms of the charter that the vessel can carry. The case is like that of a purchase of a specific chattel, the charterer of the ship must be taken to hire the ship as she is for a particular purpose, and the shipowner is only bound to fulfil that purpose so far as the vessel as she is can do so.

[BRETT, J. That construction of the charterparty appears to me to destroy the option which was expressly given to the charterer. Considerations derived from the knowledge or ignorance of the parties before entering into the contract seem immaterial when we are dealing with the terms of a written contract.]

With respect to the finding of mismanagement on the part of the master with regard to the cargo the same considerations apply. The obligation on him to bring skill and knowledge to the treatment of the cargo applies only to an ordinary, and not an exceptional, cargo. Secondly, it is not a condition precedent to the obligation to load that the vessel should be seaworthy at the time of loading, or the smallest defect which could be easily remedied before sailing would be fatal.

[BOVILL, C.J. Must she not be fit to receive the cargo?]

In order to entitle the charterer to repudiate the obligation of loading a cargo it must be shewn that the ship could not be of any use whatever to him; otherwise the whole consideration has not failed, and his remedy is by cross-action for any damage he may have suffered: *Behn* v. *Burness.* (1) The ship could have taken a cargo of any of the kinds specified in the charter except this exceptional cargo of wet sugar. It is sufficient if the charterer may derive any benefit from the ship, and with respect even to such a cargo, though the delay would have been considerable, she might have been rendered fit. The whole purpose of the adventure must be rendered impossible to exonerate the charterer: *MacAndrew* v. *Chapple* (2); *Tarrabochia* v. *Hickie* (3); *Dimech* v. *Corlett.* (4) This was a charterparty by which the ship was to go and take a cargo of the produce of the place, not a particular specific cargo which had been procured for her. It is contended that even if the charterer would have been entitled in the first instance to refuse to load on the ground that the ship was not fitted with sufficient pumps for a cargo of wet sugar, having loaded the sugar he had waived the condition precedent and could not reject the ship because the parties could not be placed in statu quo.

[BRETT, J. The loading was no benefit to the charterer.]

They also cited *Blasco* v. *Fletcher.* (5)

BOVILL, C. J. The verdict in both these actions was for the charterer, the defendant in the first action and the plaintiff in the second. A rule was obtained on behalf of the shipowner to enter a verdict for him in both actions on the findings of the jury or for a new trial on the ground of misdirection, and that the verdict was against the evidence. After hearing the evidence that was given read over, I am of opinion that the findings of the jury were in

---

(1) 3 B. & S. 752; 32 L. J. (Q.B.) 204. 8 Jur. N.S. 335, Q.B. [illegible]

(2) Law Rep. 1 C. P. 643.

(3) 1 H. & N. 183; 26 L. J. (Ex.) 26.

(4) 12 Moo. P. C. 199.

(5) 14 C. B. (N.S.) 147; 32 L. J. (C.P.) 284. 9 Jur. N.S. 1185.

1872

STANTON
v.
RICHARDSON.
RICHARDSON
v.
STANTON.

accordance with the evidence. My Brother Brett is not dissatisfied with the verdict, and, on the whole, it does not appear to me that there is any sufficient ground for disturbing the verdict on any of the questions that were left to the jury. With regard to the motion to enter a verdict, or for a new trial on the ground of misdirection, the matter depends upon the relative obligations of the shipowner and the charterer. The facts with reference to this question are undisputed. The ship was good and sound enough for ordinary purposes, and the cargo was a proper cargo for a ship that was suitable to carry it. The charterparty into which the parties entered was not quite in the ordinary form with regard to the fitness of the ship. The usual terms do not occur in the beginning, but the contract, which is between the master of the one part, on behalf of the owner and the agents of the charterer of the other part, is, that the master after having discharged his inward cargo shall sail for Manilla for orders to load within there, or at Yloilo, &c., the following cargo of lawful merchandise, a full and complete cargo of sugar, in bags, hemp in compressed bales, $^{\text{and}}_{\text{or}}$ measurement goods. In that part of the charter nothing is said as to the nature of the sugar, but in the clause relating to the rate of freight it is provided that the rate shall be 4*l.* 2*s.* 6*d.* for dry sugar, and 4*l.* 5*s.* for wet sugar. Towards the end of the charter is this engagement by the master, "that the vessel before and when receiving cargo shall be a good risk for insurance, and he will, when required, provide a survey report declaring her to be so, and during the voyage the master shall take all proper means to keep the vessel tight, staunch, and strong, well manned and provided, and in every way fitted and provided for the voyage." Under this charter the charterer was clearly at liberty to offer a cargo of wet sugar. He was clearly at liberty to load the ship at Yloilo. It appears to be well understood that the sugar which is there is wet sugar, of such a description that there is a considerable drainage from it of molasses and moisture. Under such a charter there is no doubt that the cargo offered must be a reasonable cargo of the description specified, but I am not aware of any authority to support the proposition that the charterer is bound to offer a cargo suitable to the particular ship in the state in which she is at the time of loading. The only

1872

STANTON
v.
RICHARDSON.
RICHARDSON
v.
STANTON.

limit with respect to the nature of the cargo which the charterer may ship appears to be that of reasonableness. Mr. James suggested as an illustration of his contention, the offer of exceptionally large pieces of machinery or heavy guns under a charter which simply provided for a cargo of merchandise. The answer to the argument derived from that illustration appears to be that in such a case the jury would probably say that such a cargo was not a reasonable cargo to offer; that seems to me the only mode in which such a case could be disposed of. Another illustration may be taken. Suppose the charter provided for a cargo of cattle, could it be said that the charterer was bound to offer a cargo of cattle suitable to the ship in the state in which she was at the time? If the ship were not properly fitted to receive a cargo of heavy cattle is the charterer to be bound to provide a cargo of light cattle? I think the ship must be fit to receive any reasonable cargo of the nature that the shipowner undertook to carry. The jury in the present case found that the sugar offered was a reasonable cargo to be offered. They have also found that the ship was not reasonably fit to carry a reasonable cargo of Yloilo sugar. There is a further finding that the captain, though willing, was not able to make the ship fit to carry the cargo within a reasonable time, or within such a time as not to frustrate the object of the adventure. The reason of the unfitness of the ship arose from the nature of the sugar and the character of the pumps. If the cargo had remained on board or had been reloaded, the pumps being wholly unequal to dealing with the accumulation of the drainage from the sugar, the safety of the vessel would have been endangered and the cargo wholly ruined and rendered unmerchantable. The jury having found that the vessel was not only unfit, but that she could not be made fit in such time as not to frustrate the object of the adventure, the question arises what is the obligation of the shipowner with reference to a ship chartered to carry a particular sort of goods? It seems to me that he is bound to furnish a vessel fit to carry the cargo that the charterer has undertaken to put on board. There are additional terms in this charter, viz., as to what is to be done during the voyage, and that the vessel is to be a good risk before and at the time of receiving the cargo. The jury found that the ship, at such time,

1872

STANTON
v.
RICHARDSON.
RICHARDSON
v.
STANTON.

was unfit to receive the cargo. Is there any obligation, under such circumstances, on the charterer to load, or if, having been loaded, the cargo is obliged to be immediately discharged as here, to reload? The question appears to me to answer itself. The charterer is not bound to load or reload unless the ship is fit to receive the cargo and carry it. It was said that there was an absence of authority as to the exact obligation of the shipowner in relation to these questions. This may arise from the absence of doubt as to the nature of such obligation. There seems to me, however, to be sufficient authority for the propositions for which I am now contending. Lord Ellenborough in the case of *Lyon* v. *Mells* (1), says: "In every contract for the carriage of goods between a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman, *implied by law*, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public."

It is true that these observations apply chiefly to persons following a public employment, and are made on the footing that the nature of such employment will be a guide to what the contract must be between the parties. But in a later case, before Lord Ellenborough, a similar question arose under a charterparty. That case is *Havelock* v. *Geddes.* (2) Lord Ellenborough there says, "Had the plaintiffs' neglect here precluded the defendants from making any use of the vessel, it would have gone to the whole consideration, and might have been insisted on as an entire bar." That was because the consideration would then have wholly failed. Here the jury found that what occurred did wholly frustrate the objects of the voyage, and so this case comes distinctly within the doctrine laid down in the passage I have cited. It was argued by Mr. Williams that this doctrine about frustrating the objects of the voyage was a new doctrine, introduced by the case of *Tarrabochia* v. *Hickie.* (3) This is not really so in my opinion. Several other cases, establishing the same principle, have been referred to in the argument, which are much older than *Tarrabochia* v. *Hickie* (1), and especially the case of *Freeman* v. *Taylor.* (2) The question there was one of deviation. Tindal, C.J., laid it down to the jury that if the deviation were so long and unreasonable as that in the ordinary course of mercantile business it would frustrate the whole object of the voyage, the contract was at an end. He left the case to the jury precisely as my Brother Brett left the present case, and the Court, after taking time to consider, upheld his ruling. The same doctrine may be traced back as far as the case of *Constable* v. *Cloberrie* (3), where the covenant was to sail with the first wind. It appears to me, therefore, in the present case, that the object of the voyage being frustrated, the charterer was not bound to load a cargo. It is true that he did load a cargo in the first instance, but after it was so loaded it had to be removed from the vessel, because she was unfit to carry it. It appears to me that the same reasoning applies to the question whether he was bound to reload, as applies to the question of his obligation to load. The question may be regarded from another point of view. When there are concurrent acts to be performed on each side, as, for instance, where one is to receive cargo and the other to deliver it, the party who claims as for a breach of the contract must have been ready and willing to do his part. The jury having found that the ship could not be made fit within a reasonable time, or such a time as that the object of the voyage would not be frustrated, that finding appears to me to amount to a finding that the shipowner was not ready and willing to receive the cargo offered. For these reasons, I think the verdicts must stand, and the rule be discharged.

---

(1) 5 East, 429.

(2) 10 East, 564.

(3) 1 H. & N. 183; 26 L. J. (Ex.) 26.

Byles, J. I am of opinion that in these cross actions the charterer is entitled to the judgment of the Court, and to hold his verdicts. In other words, that the ship was to blame, and not the sugar.

The charterparty provides in express terms that wet sugar may be shipped, but at a higher rate of freight than dry sugar. The evidence shews that the ship's pumps were of such a height,

---

(1) 1 H. & N. 183; 26 L. J. (Ex.) 26.

(2) 8 Bing. 124.

(3) Palm. 397.

1872

STANTON v. RICHARDSON.

RICHARDSON v. STANTON.

diameter, and description, that they would not and did not discharge the water mixed with the drainage of the wet sugar. The ship, therefore, was not, in respect of the pumps, reasonably fit to carry the goods; that is to say, the wet sugar she had contracted to carry. The charterer knew nothing of the existing pumps, neither their power nor their capacity. The shipowner or captain was bound to know, and did know. The charterer, perhaps, knew nothing of the disproportion of the thick drainage to the power of the pumps. The jury have found the negligence to be in the shipowner.

My Brother Brett's directions, which were in accordance with this view of the case, seem to me unassailable. The judge is not dissatisfied with the verdicts in these cases, and therefore they must stand.

BRETT, J. It seems to me that three questions arise in this case: first, whether the correct questions were left to the jury; secondly, if so, and they were properly answered, what is the effect of such answers on the rights of the parties? thirdly, whether they were properly answered? The answer to the first question depends on the question, what the rights and obligations of the parties are. It appears to me that they must be determined by the written contract, the construction of which is for the Court, without regard to any consideration as to the knowledge of either party, and with respect to the character of the ship or cargo. Such considerations are immaterial with regard to a written contract. The contract is a charterparty, by which the charterer is to have the option of loading a full and complete cargo of sugar, in bags, hemp, in compressed bales, $\frac{\text{and}}{\text{or}}$ measurement goods. This stipulation giving an option as to the nature of the cargo, is in favour of the charterer. Amongst the things which the charterer has the option of shipping is a cargo of wet sugar. The shipowner undertakes to carry such a cargo. In addition, the shipowner took on himself the obligation to provide a vessel that should be a good risk for insurance, and procure a survey report declaring her to be so. It was urged that, by virtue of that stipulation, the shipowner was bound to provide a ship that was seaworthy when the cargo was on board or whilst loading. I should be sorry to rest my decision on that express undertaking.

1872

STANTON v. RICHARDSON.
RICHARDSON v. STANTON.

I think the question turns on another undertaking, not express, but implied. I admit that some of the questions that were put to the jury may not, in point of form, define with perfect strictness the obligations of the shipowner, and the rights of the charterer, but it appears to me that, taking all the questions together, in substance the case was correctly presented to the jury.

It is found that the cargo offered was a reasonable cargo, and that the ship was not fit to carry a reasonable cargo ; and therefore the answers to questions 6 and 7, become in the event equivalent to one another. What then is the effect of these findings, considered with regard to the reciprocal duties arising between the charterer and shipowner from the mere fact of their having entered into an ordinary charterparty? It seems to me that the obligation of the shipowner is to supply a ship that is seaworthy in relation to the cargo which he has undertaken to carry.

I do not think, however, that this proposition completely expresses his liability, though the proposition I am about to state with regard to such liability in many cases may amount to the same thing only in effect. I think the obligation of the shipowner is to supply a ship reasonably fit to carry the cargo stipulated for in the charterparty. This appears to be the measure of his liability as stated in the case of *Lyon* v. *Mells* (1) by Lord Ellenborough, and by Lord Wensleydale in the case of *Gibson* v. *Small* (2), and again by Lord Ellenborough in *Havelock* v. *Geddes.* (3) The same rule is adopted in the edition of Abbott on Shipping, by Mr. Justice Shee, and by Blackburn, J., in the case of *Readhead* v. *Midland Ry. Co.* (4)

It is argued that the charterer is bound to ship a cargo that is suitable for the particular ship. That would be to destroy the option that is expressly reserved by the charterparty to him. With all the assistance rendered to me by counsel, I can find no more decisive mode of stating the true proposition with regard to the duties of the charterer and shipowner, than that the one must offer a reasonable cargo of the kind specified in the charter, and the other must provide a ship reasonably fit to carry such a reasonable cargo. In truth it often happens in jurisprudence, that the

---

(1) 5 East, 427.
(2) 4 H. L. 353. 17 Jan 1131
(3) 10 East, 536.
(4) Law Rep. 2 Q. B. 412.

1872

STANTON
v.
RICHARDSON.
RICHARDSON.
v.
STANTON.

law can lay down only such general rules, leaving the application of them to the particular facts to be determined by the findings of the jury. If such be the rights and duties of the parties, what is the effect as to these two actions? With respect to the action by the charterer, he sues for damages for not providing a ship according to the charter. For the purposes of that action, it is sufficient to hold that, by reason of the unfitness of the ship, there was a breach of contract, and all damages necessarily occasioned by such breach of contract, e.g. damage to the sugar, and expenses, are recoverable.

With regard to the action for not loading or not reloading, the further question arises, whether, under the circumstances, the charterer had a right to refuse to load or reload. In this action we must decide whether there was not only a breach of contract, but such a breach of contract as entitled the charterer to refuse to load or reload. The question in such cases is said to be whether the warranty was a condition. I apprehend that a stipulation amounting to a condition is necessarily also a warranty, and there may be circumstances preventing its being treated as a condition, and then it is only available as a warranty; as, for instance, when the stipulation is that the ship shall be ready to load within a fixed time or a reasonable time, and the cargo is loaded and carried; though before loading this might be a condition precedent, inasmuch as the charterer has loaded and derived benefit from the charter, he cannot rely on it as a condition, but must treat it as a warranty. The question, therefore, here is, whether the unfitness of the ship may be treated as a breach of a condition precedent; that is to say, whether it amounted to a breach of contract entitling the charterer to refuse to load or reload. I think the questions as to loading or reloading are the same, for in my opinion the effect of the agreement between the parties was that the matter should be treated as if the charterer had a cargo ready to load and refused to load it. Now, assuming that to be so, and the findings to be correct, the jury have found that the ship was not reasonably fit to carry the cargo, and that she was so unfit as to be unseaworthy with the cargo on board. But it is not necessary to decide whether the charterer would be entitled on account of such unfitness and unseaworthiness to reject the ship at once, for the jury have gone further, and found that not only was the ship unfit and unseaworthy, but also that she could not be made reasonably fit and seaworthy, not only within a reasonable time but within such a time as would not entirely frustrate the whole adventure. It seems to me that the conclusion to be drawn from all the cases analogous to this is, that if the breach of contract by the shipowner be such as to justify the charterer in not putting the cargo on board at the moment of the breach, and it cannot be remedied within such a time as not to frustrate the object of the voyage, this absolves the charterer altogether. It would be a gross injustice if it were otherwise. The charterer must be taken to have entered into the contract with the usual mercantile objects of such a contract, which objects must be taken to be known also to the shipowner, and it cannot be that the shipowner is to hold the charterer to his bargain if those objects are frustrated.

If in such a case as the present he were bound to put the cargo on board in the first instance, he clearly was not bound to reload after what occurred.

The only remaining question is whether the findings of the jury were against the evidence, and with regard to this question I cannot say that after the case was fully gone into there appeared to me to be much difficulty with regard to the facts. It seems to me that the verdicts ought not to be disturbed. For these reasons I think that the rule should be discharged.

Rule discharged.

Attorneys for charterer: *Waltons, Bubb, & Walton.*
Attorneys for shipowner: *Thomas & Hollams.*

1872
June 5.

HEILBUTT AND OTHERS *v.* HICKSON AND OTHERS.

Sale of Goods by Sample—Right to reject Goods not in accordance with Contract, and recover Price paid for them—Acceptance.

10 CP 395

The defendants being shoe manufacturers contracted with the plaintiffs to supply 30,000 black army shoes as per sample, to be delivered free at a wharf, to be inspected and quality approved before shipment, and payment to be made in cash at the time of each delivery. It was well known to the defendants that the shoes were required for the French army for a winter campaign. A sample shoe was deposited, and a large number of shoes having been inspected and approved by the plaintiffs' agent under the contract, invoices for such shoes were made out and signed by the plaintiffs' agent, and the shoes were then sent to Fenning's Wharf, London, which had been named by the plaintiffs as the place for delivery. On the inspection of the shoes the soles were not opened, and without opening them it was impossible to tell what the "fillings" of the soles consisted of. The shoes were paid for by the plaintiffs, and forwarded by them to Lille, for the purpose of meeting a contract entered into with the French government for the supply of shoes for the French army. Circumstances had in the mean time occurred which gave rise to suspicions on the part of the plaintiffs that the shoes so forwarded might contain paper in the soles; and the defendants knowing at that time that the shoes were intended to be sent to Lille under a contract for the supply of shoes to the French army, and would have to be passed by the French authorities there, signed a letter to the plaintiffs agreeing to take back the shoes that might be thrown on their hands in consequence of paper being found in them, it being understood that they would not take back any large number of shoes if paper should be found in only a few pairs. The shoes were tendered to the French authorities at Lille, and rejected because a great number of pairs were found on being opened to contain paper. A considerable number of the shoes being afterwards opened, a very large proportion of those so opened were found to contain paper in the soles. Shoes with paper in the sole are not fit for army shoes. A small quantity of shoes, which had been inspected and approved under the contract, and the price of which had been paid, had been delivered at Fenning's Wharf and not forwarded to Lille. The plaintiffs gave notice to the defendants that they rejected the shoes delivered, and refused to receive any more, and brought an action against the defendants for breach of contract, claiming to be entitled to throw the shoes already delivered under the contract upon the defendants' hands at Lille and at Fenning's Wharf, and to recover (inter alia) the amount of the price of the shoes. The jury found at the trial that the defects in the shoes could not have been discovered by any inspection which ought reasonably to have been made:—

Held, that the letter of the defendants must be treated as a new and additional contract between the parties, adding fresh terms to the original contract with reference to the difficulties that were likely to arise with the French authorities at Lille, and upon the proper construction of the whole contract, including the letter, the plaintiffs were entitled to throw the shoes on the defendants' hands at Lille and at Fenning's Wharf, and recover the price of them.

Per Bovill, C.J., and Byles, J., but for the letter, and under the contract as it originally stood, the plaintiffs could not have rejected the shoes and recovered the price of them, having accepted them and dealt with them as their own property.

Per Brett, J. Apart from the special agreement contained in the letter, the plaintiffs would have been entitled to return the shoes on the defendants' hands at Lille, and to recover the price of them, inasmuch as the inspection in London was ineffectual by reason of a latent defect for which the defendants as manufacturers of the shoes were responsible, and the shoes were rejected immediately upon opportunity occurring for the discovery of such defect.

THIS was an action for breach of a contract by the defendants, who were boot and shoe manufacturers, to supply 30,000 army shoes to the plaintiffs. (1)

The trial took place before Brett, J., in London, when the verdict was entered for the plaintiffs for 4214*l.* 5*s.* damages, leave being reserved to the defendants to move to reduce the damages to such sum as the Court might think fit.

The facts of the case are fully stated in the judgment of the Court. The main question raised was whether the plaintiffs, under the circumstances of the case, could reject the shoes which had been delivered and paid for under the contract, as not answering the description contracted for, and recover back the price.

A rule nisi was obtained (inter alia) to reduce the damages, pursuant to the leave reserved, on the ground that there was an acceptance by the plaintiffs of the goods delivered, that by the dealings by the plaintiffs with the goods the plaintiffs were precluded from recovering except for a breach of warranty, and that the plaintiffs could not recover the price of the goods delivered and paid for except on returning such goods.

May 25, 27, 30, 31. *Sir J. B. Karslake, Q.C., Watkin Williams,* and *McLeod,* shewed cause. The shoes not being in accordance with the contract the plaintiffs were entitled to throw them upon the defendants' hands at Lille, and recover the price they had paid for them. The inspection in England was ineffectual by reason of a defect in the goods which the plaintiffs could not discover by in-

---

(1) It is not considered necessary to set out the pleadings, inasmuch as it was agreed that the Court should consider the question which related to the proper measure of damages recoverable for the breach of contract, apart from any question of pleadings.

1872

HEILBUTT
v.
HICKSON.

spection, and the defendants being the manufacturers of the goods were responsible for such defect. The plaintiffs were, therefore, entitled immediately upon the discovery of the defect, to return the goods. No inspection could have been made which would have detected the defect without the destruction of the article inspected. The jury have found that no reasonable inspection would have detected it. The property does not pass by the sale; the moment that the plaintiffs were aware of the character of the shoes they rejected them. *Bannerman* v. *White* (1); *Street* v. *Blay* (2); *Okell* v. *Smith* (3); notes to *Cutter* v. *Powell.* (4)

[BOVILL, C.J. Did not the property in the shoes pass upon their inspection, approval, and delivery in England and the payment of the price? Can the plaintiffs be entitled to reject the goods after they have dealt with them as their own and forwarded them to Lille?

BRETT, J. It must be admitted that but for the nature of the defects, which could not have been discovered by any reasonable inspection, there would have been an acceptance in England, and the property would have passed.]

The goods were taken into the plaintiffs' possession, but not conclusively accepted. It is contended that under the circumstances the property had not indefeasibly passed. The rule to be derived from the authorities is, that, if a buyer accepts the goods and treats them as indefeasibly his property, he is remitted to his cross action if there be a breach of warranty, and cannot return the goods; but if he only receives them and keeps them such a time as is necessary for a fair examination, he is to be considered as not having received them. Here the plaintiffs did not take an unreasonable time in finding out the defect. The conduct and representations of the defendants prevented them from repudiating the goods earlier. The present case comes within the qualification in *Street* v. *Blay* (2), which admits of the right to reject the goods provided that the purchaser has done nothing more in the mean time than was necessary to give them a fair trial.

[BOVILL, C.J. Is it not essential to the right to reject that the parties can be put in statu quo? The plaintiffs sent these goods to France and claim to reject them there.]

---

(1) 10 C. B. (N.S.) 844; 31 L. J. (C.P.) 28. 8 Jur. N.S. 989.

(2) 2 B. & Ad. 456.

(3) 1 Stark. 107.

(4) 2 Sm. L. C. 6th ed. 1, 26.

It is submitted that the word "return" as used in the cases means "reject," and that the party rejecting the goods as not being in accordance with the contract, cannot be bound to send them back, at any rate if they are not small parcels but articles of great bulk like a steam-engine or a cargo of wheat. He is entitled to say to the party in default, "I reject them, and they lie at your risk." It is submitted that the defendants' letter of the 11th of February, being written when they had full knowledge that the goods were to go to Lille and were to be inspected by the French authorities, clearly gave the plaintiffs a right to reject the goods at Lille even if they could not have done so under the original contract.

It is contended with respect to the goods that were not forwarded to Lille that they clearly may be rejected and their price recovered.

[They also cited *Mondel* v. *Steel* (1); *Hunt* v. *Silk* (2); *Clarke* v. *Dickson* (3); *Blackburn* v. *Smith* (4); *Nichol* v. *Godts* (5); *Allan* v. *Lake* (6); *Head* v. *Tattersall* (7); *Makin* v. *London Rice Mill Co.* (8)]

Parry, Serjt., Butt, Q.C. and *Russell, Q.C.*, supported the rule. The plaintiffs had no right to reject these goods. It is clear, upon the authorities, that the property in the shoes, both those forwarded to Lille and those not so forwarded, had passed to the plaintiffs. But for the fact of notice to the defendants for what purpose the goods were required, and the defect being a latent defect, there could be no question that the plaintiffs could not return the goods after dealing with them as they have done. It is submitted these facts make no difference in principle. The property would not, it is true, pass by the mere contract, as these were not specific goods. But the moment that all is done to the goods that is required, and they are appropriated to the purchaser, the property passes. *Fragano* v. *Long* (9); *Atkinson* v. *Bell* (10); *Bowes*

---

(1) 8 M. & W. 871.

(2) 5 East, 449.

(3) E. B. & E. 148; 27 L. J. (Q.B.) 222. 4 Jur. N. S. 832

(4) 2 Ex. 790; 18 L. J. (Ex.) 187.

(5) 10 Ex. 191; 23 L. J. (Ex.) 314.

(6) 18 Q. B. 560.

(7) Law Rep. 7 Ex. 7.

(8) 20 L. T. (N.S.) 705; 17 W. R. 768.

(9) 4 B. & C. 219.

(10) 8 B. & C. 277.

v. *Pontifex* (1); *Hunt* v. *Silk* (2); *Beed* v. *Blandford* (3); *Blackburn* v. *Smith* (4); Benjamin on Sale, 104 et seq.; *Morton* v. *Tibbett* (5); *Cusack* v. *Robinson.* (6) If the property has once passed the purchaser cannot return the goods. *Street* v. *Blay* (7) compendiously states the law applicable to this case. When under an executory contract of sale the indeterminate goods have been appropriated to the contract, and that appropriation has been assented to, the result is the same as if the contract had originally been for specific goods.

[Brett, J. The question is, whether there has been a sufficient assent to the appropriation here.]

With respect to the goods forwarded to Lille, the plaintiffs have exercised dominion over them and impressed a new destination upon them: *Chapman* v. *Morton* (8); *Harnor* v. *Groves* (9); *Parker* v. *Wallis.* (10) All the goods delivered were inspected and approved in accordance with the terms of the contract, and the price was paid. The plaintiffs had their attention fully directed to the question whether the shoes contained paper, and it is contended that they might have opened a sufficient number of the shoes to satisfy themselves on this point. If they choose to accept without satisfying themselves on this point, they cannot afterwards reject the shoes. It is contended that if there be a right to reject, the purchaser cannot reject without returning the goods. Could the purchaser export the goods to China, and on its being discovered there that they were not according to contract, throw them on the vendor's hands there? The purchaser has no right to reject the goods unless he can place the vendor in statu quo. If he can reject without returning the goods, he must at least reject at the place where the vendor was bound to deliver. The letter of the 11th of February does not alter the case; it did not entitle the plaintiffs to throw the shoes on the hands of the defendants without returning them. On these grounds the damages ought not to include the price of the shoes, but only such damages

(1) 3 F. & F. 739.

(2) 5 East, 449.

(3) 2 Y. & J. 278.

(4) 2 Ex. 783.

(5) 15 Q. B. 428; 19 L. J. (Q.B.) 382.

(6) 1 B. & S. 299; 30 L. J. (Q.B.) 261.

(7) 2 B. & Ad. 456.

(8) 11 M. & W. 534.

(9) 15 C. B. 667; 24 L. J. (C.P.) 53.

(10) 5 E. & B. 21.

as properly arise from the breach of warranty: *Loder* v. *Kekule.* (1) It is also contended that the loss of profit, whether on the shoes already delivered or those undelivered, cannot be recovered. The shoes delivered were equal to sample, for the sample shoe did contain paper; therefore the French authorities would have rejected the shoes even if equal to sample, so the loss of profit did not arise from the goods not being equal to sample; the damages ought to be the difference in value only between the shoes that were and those which ought to have been delivered.

[BRETT, J. But the defect was a latent defect, which could not be discovered by any reasonable examination or by comparison with the sample, and the goods were not of the description contracted for, viz., army shoes.]

With respect to the loss of profit on the shoes undelivered, the contract is divisible; the fact that those delivered were not according to contract did not entitle the plaintiffs to refuse to receive the remainder.

Cur. adv. vult.

July 5. BOVILL, C.J. This case was argued before my Brothers Byles and Brett and myself. My Brother Byles concurs in the judgment I am about to deliver; and I will presently read the judgment of my Brother Brett.

This action was brought for the breach of contract by the defendants to supply a large quantity of shoes for the French army; and the questions which were raised related almost entirely to the damages which the plaintiffs were entitled to recover, but also involved some important points with respect to the vesting of property in goods under an executory contract of sale, and as to the right of the purchasers to reject the goods after having received and paid for them.

The original contract was entered into between the plaintiffs and the defendants on the 30th of December, 1870, and was for 30,000 black army shoes, as per sample, at 4*s.* 8*d.* per pair, less 2½ per cent. discount, to be delivered free at a wharf in weekly quantities; to be inspected and quality approved before shipment; and payment to be made in cash at the time of each delivery. The times for the delivery of the shoes were afterwards altered, by consent.

---

(1) 3 C. P. (N.S.) 128; 27 L. J. (C.P.) 27. 4 Jur N.S. 93.

The plaintiffs, who were merchants in London, in entering into this contract, were acting under instructions from and on behalf of a M. Potel and a Mr. Ireland, of Lille.

The defendants were shoe manufacturers in London and at Northampton; and at the time the contract was entered into it was known to all parties that the shoes were required for the French army, and for a winter campaign. A sample shoe was deposited, and which was also submitted to the French authorities, with whom M. Potel had made a contract for supplying the shoes.

The plaintiffs appointed a person in the trade (Mr. Roberts) to inspect the shoes on their behalf; and several hundred pairs were rejected; but a large number were inspected and approved by him. The invoices were then made out and signed by the plaintiffs' agent, Mr. Harry, and the shoes were thereupon sent to Fenning's Wharf, London, which had been named by the plaintiffs as the place for delivery. On the inspection of the shoes, the soles were not opened, and it is not usual to open them, but without doing so it could not be ascertained of what the fillings of the soles consisted, or whether there was paper in them or not.

The first delivery at Fenning's Wharf took place on the 30th of January, 1871, and on that day, and before this parcel was delivered, a statement had appeared in some of the newspapers that a contractor had been imprisoned in France for putting paper into the soles of the shoes. Some communication took place with one of the defendants upon the subject; and the evidence was contradictory as to whether the defendant had or had not said that there was no paper in the shoes, as far as he was aware; but it was proved that, on the 2nd or 3rd of February, Mr. Harry, acting for the plaintiffs, and before the shoes were shipped, requested that a shoe might be cut open, to see if there was any paper in the sole, that the defendants' foreman (Webb) assented to this being done, and stated that the plaintiffs might cut open as many as they pleased, and would not find any paper in them. The sole of a shoe was accordingly cut open, and no paper was found in it. The plaintiffs' evidence also went to shew that many assurances were given on the part of the defendants that there was no paper in the soles of the shoes.

The plaintiffs then paid the defendants for the shoes which had been delivered by them at Fenning's Wharf, being twenty-two cases, containing about 4950 pairs, and shipped them for Dunkirk, to be thence forwarded by railway to Lille, where they were to be delivered to the French authorities. This parcel arrived at Lille on the 10th of February.

In the meantime the plaintiffs had forwarded one pair of the shoes to Mr. Ireland at Lille; and this pair, having been opened by him, was found to contain pieces of paste-board box in the soles. A communication was made on the 9th of February to one of the defendants, who stated that it must be a mistake; and several more pairs of shoes were then opened and found not to contain paper. The sole of the sample shoe was at the same time opened, and it was found that this shoe did contain paper. The plaintiffs then stopped the further delivery of shoes by the defendants. Mr. Harry took several of the pairs which had been opened and found not to contain paper, and the sample shoe which did contain it, to Lille, and, after communicating with Mr. Ireland, he telegraphed to the plaintiffs on the 10th of February, "Pay for and ship all Hickson's goods ready at wharf and warehouse."

At that time some more shoes had been inspected, approved, and delivered at Fenning's Wharf on the 7th or 8th of February, and the defendants had asked for a cheque for them, which had been refused; but, upon receipt of the telegram from Mr. Ireland, the plaintiffs paid for those shoes which had been so delivered. At this time it was well known to the defendants that the shoes were required to be sent to Lille for the French army, and had to be passed by the French authorities, and that the sample shoe and the shoe sent to Mr. Ireland had been found to contain paper in the soles; and after some discussion upon the subject, and as to the terms of the following letter, the defendants agreed to and eventually on the 13th of February signed the letter which bears date the 11th of February.

By that letter, which is addressed to the plaintiffs, the defendants agreed to take back those shoes which might be thrown back on their (the plaintiffs') hands in consequence of paper being found in them; it being understood that they could not take back any large number of shoes if paper should be found in only a few pairs; and they stated their willingness that the closest inspection should be made.

Upon this letter being signed and given to the plaintiffs, the inspection and delivery of the shoes were continued, several parcels were delivered at the wharf after having been inspected by Mr. Roberts and passed by Mr. Harry for the plaintiffs, and the plaintiffs paid for them, and forwarded them by sea and railway to Lille. The total quantity thus forwarded to France was 12,225 pairs. The cost of the transit and the duty in France were paid by Mr. Ireland. There were more shoes delivered at Fenning's Wharf, which were afterwards sold under an arrangement between the parties.

On the 26th of February, information reached this country that some of the shoes had been found to contain paper; and on the 28th of February, upon the entire quantity which had been shipped being tendered to the French government, some were opened and found to contain paper, and the whole were rejected by the French authorities. The shoes were then sent by the French military intendant to a public bonded warehouse at Lille, where they were deposited, and still remain.

The defendants were informed of the rejection of the shoes; and one of them at once proceeded to Lille, and, with the other parties concerned, endeavoured to get the shoes passed by the French authorities. In this, however, they were not successful, and the French government refused to take any of the shoes.

One of the defendants, on being asked the question, would not guarantee that there were not 5000 pairs with paper in them, though he stated that he would guarantee that there were not 7000 pairs that had paper in the soles.

A considerable number of the shoes were opened at Lille, and many of them (in one instance seventeen pairs out of eighteen that were opened) were found to contain paper; and Mr. Ireland therefore told one of the plaintiffs, who was present when this was discovered, that, in consequence of the defendants' letter of guarantee of the 11th of February, he should take no further steps in the matter, and that he threw the goods on the defendants' hands.

The defendants were required to return the money for the shoes, and were told that the plaintiffs would hold them to the letter of guarantee. One of the defendants in answer stated that, before he would take back any of the shoes, the plaintiffs must shew him what shoes did contain paper; and, upon the plaintiffs stating that this was absurd, and that they should have to destroy all the shoes to find it out, the defendant said that he could do no more, that the plaintiffs must cut open what they liked, and any which contained paper the defendants would take back.

From examinations of a number of the shoes, made subsequently and after this action was commenced, it appeared that a large proportion, and considerably more than half of over 100 pairs which were examined from different cases, did contain paper, canvas shavings, or asphalte roofing-felt, and nearly one-half of the whole of them contained paper in the soles; of fourteen other pairs, only three contained leather fillings in the soles; and, of fifty other pairs, nearly the whole contained paper. The objection to paper was stated to be that, when it becomes wet, from the pressure of the foot it dries up in lumps; and one of the defendants admitted at the trial that shoes with paper in the soles were objectionable for a soldier, and were not fitted for a winter campaign.

There was also evidence on the part of the plaintiffs to shew that, even independently of the paper, the shoes were not equal to the sample. The defendants called a number of witnesses to shew that the whole of the shoes, including about 17,000 pairs which were ready to be delivered, were equal to the sample; but none of those witnesses had opened the soles of any of the shoes.

Upon the matters left to the jury, they found that the shoes delivered, and also those that were ready for delivery, were not equal to the sample, and that the defects could not have been discovered by any inspection which ought reasonably to have been made by Roberts or Harry.

It had also been contended by the defendants that the letter of the 11th of February was not intended to be a binding agreement, but only to be shewn to the French authorities; but the jury found that the letter was intended to be an undertaking by the defendants, in order to settle a bonâ fide dispute.

The damages, under the direction of my Brother Brett, who tried the cause, were assessed as follows:—

	Fr.	c.				£	s.	d.
To amount paid for 12,825 pairs of shoes delivered at Fenning's Wharf, of which 12,225 pairs were sent to Lille, at 4*s.* 8*d.*, less 2½ per cent.						2917	13	9
To cost of 57 packing-cases for the above shoes sent to Lille						26	7	3
Charges, freight, and insurance on same						46	15	6
Duty, carriage, and expenses, Dunkirk to Lille ..						280	12	6
						£3271	9	0
Cartage and warehouse dues to railway	586	0						
Cartage to the military warehouse ..	123	60						
Warehouse expenses at Lille ..	1915	70						
						105	0	0
To loss of profit on above-mentioned 12,825 pairs. They would have valued at 7 fr. 25 c.			£3719	5	0			
Cost, as above			3271	9	0			
						447	16	0
The like proportion of profit in respect of 17,175 pairs remaining to be delivered						495	0	0
						£4214	5	0

The verdict was entered for the plaintiffs for the whole of these sums; leave being reserved to the defendants to move to reduce the damages by any sum that the Court might think right.

A rule nisi was accordingly granted; and the main practical question upon the argument of the rule was as to which party was to bear the risk and loss upon the shoes remaining at the warehouse at Lille, since they were rejected by the plaintiffs.

The defendants contended that the plaintiffs had accepted the goods, and were not at liberty afterwards to reject them; that the shoes consequently remained the plaintiffs' property and at their risk; and that the plaintiffs could only recover damages as for the breach of warranty. The plaintiffs, on the other hand, contended that they were entitled to reject the goods and to throw them on the defendants' hands at Lille, and that they were entitled to recover back the whole price that they had paid for them, as well as damages for the breach of contract,—leaving the shoes the property of the defendants and at their risk.

A number of authorities were cited in the course of the argument as bearing upon these questions; but the principles of law which are applicable to such cases are now tolerably well settled.

Where specific and ascertained existing goods or chattels are the subject of a contract of immediate and present sale, and whether there be a warranty of quality or not, the property generally passes to the purchaser upon the completion of the bargain, and the vendor thereupon has a right to recover the price, unless from other circumstances it can be collected that the intention was that the property should not at once vest in the purchaser. Such an intention is generally shewn by the fact of some further act being first required to be done; such as, for instance, in most cases, delivery—in some cases, actual payment of the price—and in other cases, weighing or measuring in order to ascertain the price, or marking, packing, coopering, filling up casks, or the like.

Where there is a warranty of the quality of such specific goods, that circumstance will not prevent the property in them passing to the purchaser; and, if it be simply a warranty, will not entitle the purchaser to refuse to accept the goods, or to return them, merely because the warranty is not fulfilled; and in order to entitle the purchaser so to refuse or to return them, it must, in the case of specific goods, be a term of the contract that he shall be at liberty to do so.

In the case of executory contracts, where the goods are not ascertained or may not exist at the time of the contract, from the nature of the transaction no property in the goods can pass to the purchaser by virtue of the contract itself; but, where certain goods have been selected and appropriated by the seller, and have been approved and assented to by the buyer, then the case stands, as to the vesting of the property, very much in the same position as upon a contract for the sale of goods which are ascertained at the time of the bargain. In most cases of such executory contracts, something more would generally remain to be done, such as, for instance, selection or appropriation, approval, and delivery of some kind, before the property would be considered as intended to pass, and upon that taking place the property might pass if it was intended to do so, equally as in the case of a contract for specific

1872

HEILBUTT
v.
HICKSON.

and ascertained goods. Lord Wensleydale, in the case of *Dixon* v. *Yates* (1), put the case of the sale of a specific chattel upon the same footing as the sale of an unascertained chattel after delivery, for the purpose of shewing that the property vested in the latter case upon delivery, and in the former by the contract itself: and see also upon this subject *Alexander* v. *Gardner* (2); *Aldridge* v. *Johnson* (3), which was confirmed by *Langton* v. *Higgins* (4); also the judgment of Parke, B., in *Wait* v. *Baker* (5); *Brown* v. *Hare* (6), in error; and *Tregelles* v. *Sewell.* (7)

In cases where, under an executory contract, goods are sent by the vendor which do not come within the general description of those contracted for, the purchaser may refuse to receive or may reject them; and equally so if there be any other condition in the contract which is not complied with; so, in like manner, if a fraud has been practised by the seller, then, upon discovery of the fraud, and within a reasonable time, and if nothing has been done by the purchaser to alter the position of the vendor, the purchaser may reject the goods.

In the judgment of the Court of Exchequer Chamber delivered by my Brother Williams in the case of *Behn* v. *Burness* (8), the law is thus laid down:—"In cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered to him in performance of the contract, on the ground that it does not correspond with the descriptive statement, or, in other words, that the condition expressed in the contract has not been performed: still, if he receive the thing sold, and has the enjoyment of it, he cannot afterwards treat the descriptive statement as a condition, but only as an agreement, for a breach of which he may bring an action to recover damages." And in the last edition (1871) of the notes to Williams' Saunders, vol. i. p. 554, the result of several of the cases is thus stated by the learned editor: "When it appears that the consideration has

(1) 5 B. & Ad. at p. 340.

(2) 1 Bing. N. C. 671.

(3) 7 E. & B. 885; 26 L. J. (Q.B.) 296.

(4) 4 H. & N. 402; 28 L. J. (Ex.) 252.

(5) 2 Ex. 1.

(6) 4 H. & N. 822; 29 L. J. (Ex.) 6.

(7) 7 H. & N. 574.

(8) 3 B. & S. at p. 756; 32 L. J. (Q.B.) 204.

been executed in part, that which was before a warranty or condition precedent, loses the character of a condition, or, to speak more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word, viz. a stipulation by way of agreement, for the breach of which a compensation must be sought in damages."

Although the property in the goods, whether under an immediate or an executory contract of sale, may have passed, there may still in each instance be a lien for the purchase money, and a right to stop in transitu, and the purchaser may not be entitled to possession without payment of the price.

In cases of executory contracts, where there is a warranty of quality, the purchaser is not only not bound to receive the goods unless they correspond with the warranty, but, even after they have been delivered by the vendor, may reject them on discovering the defect. It is, however, generally necessary, in order to enable the purchaser to recover back the price which he may have paid for the goods, that he should not have done more than was necessary for a fair trial of them, or for the purpose of examination and comparison, and also that he should reject the goods within a reasonable time, and that he should not have done any act to alter the position of the vendor, nor, as was said by Parke, J., in *Street* v. *Blay* (1), to delay the return of the goods. If the purchaser has exercised acts of dominion over the goods, as by parting with the property in them, or has prevented the vendor being placed in the same situation, then, generally speaking, he will not be entitled to return or reject them: *Street* v. *Blay* (2); and see also *Hunt* v. *Silk* (3), *Clarke* v. *Dickson* (4), especially the observations of Crompton, J., and the conclusion of the judgment in *Blackburn* v. *Smith.* (5)

In some cases, however, such as where the goods are utterly valueless, the dealing with them by the purchaser has been held not to affect his right to reject and to refuse to pay anything for them; as in *Poulton* v. *Lattimore* (6), where the purchaser had sown some and sold other part of certain clover seed which had

(1) 2 B. & Ad. at p. 458.
(2) 2 B. & Ad. 457.
(3) 5 East, 452.
(4) E. B. & E. 148. 4 Jur. N.S. 832
(5) 2 Ex. 792.
(6) 9 B. & C. 259.

1872

HEILBUTT v. HICKSON.

been warranted as new growing seed, but the whole of which turned out to be totally unproductive and useless.

In determining what is a reasonable time for rejecting goods, the conduct of the seller may be taken into consideration; as, where by a subsequent misrepresentation he has induced the purchaser to prolong the trial: *Adam* v. *Richards.* (1) And, where a purchaser is entitled to reject goods, and gives notice to the vendor that he has done so, the latter is bound to take them away; and, if he omits to do so, they remain at his risk, as was laid down by Bayley, J., in *Okell* v. *Smith.* (2)

Upon the argument it was agreed that the Court should deal with the question of damages independently of the particular form of the pleadings in the action.

If the case had rested on the original contract, we should have thought, as to the 12,225 pairs of shoes sent to France, that by the appropriation of these shoes by the defendants for the plaintiffs, the inspection and examination of them by the plaintiffs' agents, their being passed by those agents, the making out of invoices of the shoes so passed, debiting the plaintiffs for them as bought by the plaintiffs from the defendants, the delivery of them at the wharf, and the defendants having no further control over them, the plaintiffs' paying the defendants the amount of the invoices and subsequently sending the goods as their own to France and causing the freight and duty to be paid on them, and tendering them to the French authorities under the contract of M. Potel,—they must be taken to have accepted those shoes, that the property in them vested in the plaintiffs, and that they were not at liberty to reject the shoes and throw them back upon the defendants' hands; see, in addition to the cases cited, and those above referred to, *Rhode* v. *Thwaites* (3) and *Parker* v. *Palmer.* (4) The same rule would also in our opinion have applied to the small quantity of shoes which were approved, passed, and delivered, and paid for, and received at Fenning's Wharf.

In this view of the case, the shoes delivered would have remained the property of the plaintiffs and at their risk, though they would still have been entitled to claim damages by reason of the breach of

(1) 2 H. Bl. 573.

(2) 1 Stark. 109.

(3) 6 B. & C. 388.

(4) 4 B. & A. 387.

warranty, and not be precluded by their acceptance of the goods, or the vesting of the property in them, from maintaining this action. The damages, however, in that case would not have included the whole price paid for the shoes, but only the difference between the value of those which were delivered and what would have been their value if they had been supplied according to the contract, with such other amounts as the plaintiffs could legally establish.

The plaintiffs were not content with this view of the case, but desired to throw the shoes altogether upon the defendants, and contended that they were entitled to recover back the whole price which they paid for the shoes, as well as the expenses to which they had been put, and the loss of profits from their being prevented carrying out the contract with the French government; and the question is, what damages the plaintiffs are now entitled to recover.

The contract was expressly made for army shoes. At the time it was entered into, both parties were aware that the shoes were wanted for the French army, and for a winter campaign; and by the 13th of February, the defendants were aware that the shoes were to be forwarded to Lille in fulfilment of a contract with the French authorities, and that the shoes would be rejected and the contractors probably imprisoned if the shoes which were tendered should be found to contain paper fillings in the soles. The letter which is dated the 11th of February, and was signed on the 13th, must be construed with reference to the state of things existing and of which the defendants were aware at that time. The defects in the soles of the shoes were such as could not be discovered by any ordinary inspection or examination, or, indeed, without cutting open the soles; and the defendants, as the manufacturers, would be responsible for the improper acts of the workmen employed by them to manufacture the shoes, in putting improper fillings into the soles. It must also, we think, be considered that they had by their statement and conduct induced the plaintiffs to believe that there was little or no paper in any quantity of shoes, and with a knowledge on their part that, if the soles of the shoes were found to contain paper, they would in all probability be rejected by the French authorities.

Upon the finding of the jury as to the letter of the 11th of February, it must, we think, be treated as a new additional contract between the parties, adding fresh terms to the original contract with reference to the difficulties that had arisen and were likely to arise with the French authorities at Lille; and, upon the proper construction of the whole contract, including the letter of the 11th of February, we are of opinion that the plaintiffs were entitled to throw back the shoes upon the defendants' hands at Lille, upon their being rejected by the French authorities, if a large quantity of them did in fact contain paper in the soles. We think it was not necessary that every shoe should be cut open, and that the examination which has been made of a large number of them before and since the action was commenced was sufficient to shew that a large proportion of them did contain paper; and we think, therefore, that the plaintiffs were entitled to throw back the whole of those which had been forwarded to France upon the defendants' hands at Lille; that the defendants were bound to take them back at that place; and that, as the shoes were rejected by the plaintiffs, and due notice given to the defendants, the shoes remained at the risk of the defendants, and were their property, and that they are liable to repay to the plaintiffs the whole of the price paid for those shoes.

We are of the same opinion with respect to the shoes delivered at Fenning's Wharf, and paid for by the plaintiffs but not forwarded to Lille, and which were sold by arrangement, as before mentioned.

It was contended for the defendants that, as the sample shoe contained paper, and the French government would have rejected the shoes if they had been precisely in accordance with the sample in that respect, the damages, and especially the loss of profit, did not result from the breach of warranty, in the shoes not being equal to sample. But the fact of the improper paper fillings in the sole of the sample shoe was a hidden defect, and appears to have been unknown to all parties. It could not be seen or discovered by any ordinary examination of the shoes; and the letter of the 11th of February was expressly directed to the point of paper being in the shoes, and in our opinion gave the right to reject the shoes on that ground, and entitles the plaintiff to recover the loss of profit which would have accrued if the shoes had been accepted by the French authorities.

No question was raised, and very properly, as to the rights of the plaintiffs to recover as damages the charges and expenses incurred in sending the goods to Lille and the expenses upon them there; and the only remaining question as to the damages was, whether the plaintiffs were entitled to recover as damages the loss of profit on the 17,175 pairs of shoes which were ready for delivery though not delivered to the plaintiffs. It seems to us, upon the finding of the jury, that these shoes also were not according to contract; and as the whole formed part of one contract, there is no valid distinction in this respect between these shoes and those which were in fact delivered, and that the plaintiffs are entitled to recover the loss of profit upon the whole quantity.

With reference to this last point a further question was raised as a ground for a new trial, that the verdict was against the weight of the evidence as to these 17,175 pairs of shoes; but we think there was abundant evidence to warrant the finding of the jury. The defendants' evidence was most unsatisfactory. My Brother Brett, who tried the cause, reports to us that he is not dissatisfied with the verdict; and we see no sufficient grounds for setting it aside or interfering with it upon this point.

Upon the whole, we are of opinion that the plaintiffs are entitled to maintain the verdict for the whole amount of damages for which it was entered, that the shoes are the property of the defendants, and remain at their risk, and that the rule to reduce the damages, or for a new trial, must be discharged.

BRETT, J. (1) I agree with the Lord Chief Justice in the conclusion at which he has arrived. I agree also with the construction given by my Lord to the agreement of the 11th of February, and its effect upon the original contract and on the plaintiffs' rights. But I am, with much deference, unable to agree with the view expressed by my Lord of the plaintiffs' rights as affected by the original contract if it stood alone and in the events which have happened. I think that, under the original contract and on the events which ensued, the plaintiffs would have had the right to throw the shoes upon the defendants' hands at Lille.

(1) Read by Bovill, C.J.

1872

HEILBUTT
v.
HICKSON.

Besides the incidents attaching to a contract of sale by sample, and which have been enumerated by my Lord, I think there is also the following, that such a contract always contains an implied term that the goods may under certain circumstances be returned; that such term necessarily contains certain varying or alternative applications, and, amongst others, the following, that, if the time of inspection, as agreed upon, be subsequent to the time agreed for the delivery of the goods, or if the place of inspection, as agreed upon, be different from the place of delivery, the purchaser may, upon inspection at such time and place, if the goods be not equal to sample, return them *then and there* on the hands of the seller. Otherwise the right of inspection given to the purchaser would fail in its primary object.

The time of inspection agreed upon in this contract was before delivery, and the place was London. If by any reasonable care, or exercise of reasonable forethought, the plaintiffs could have had before delivery and in London an inspection which would by reasonable care or skill have been effective, I should have thought that they could not have rejected the goods at Lille; if the defect had been such as neither the defendants nor any one for whose fault or negligence they were answerable in law could by reasonable care or skill have discovered, I should have still been inclined, though with more doubt, to say that the plaintiffs could have rejected the goods at Lille. But here the defendants knew from the beginning that the subject-matter of their contract was an article contracted for in order to fulfil a contract for a delivery of shoes by sample at Lille; so that, if they prevented an effective inspection in London, there could be no other inspection before the arrival of the goods at Lille; and the defect in the shoes, which made the same breach of the same term as to quality in both contracts, was the consequence of acts of their servants, they (the defendants) being the manufacturers of the goods; and the defect, though known to the defendants' servants, was a secret defect, not discoverable by any reasonable exercise of care or skill on an inspection in London. By the necessary inefficacy of the inspection in London—an inefficacy caused by this kind of fault, viz. a secret defect of manufacture which the defendants' servants, committed—the apparent inspection in London could be of no more practical effect than no inspection at all. If it could be of no practical effect, there could not, as has been observed, be any effective, and, therefore, any real practical inspection until an inspection at Lille.

No real use was made or could be made of the goods before their acceptance by the French government at Lille. The apparent inspection in London, then, being by the acts of the defendants' servants no inspection at all, and consequently a real inspection at Lille being by the acts of the defendants' servants the first possibly effective inspection, and no use of the goods having been made before the inspection at Lille, it seems to me that such inspection was, by the acts of persons for whose acts the defendants were responsible, substituted for the first inspection stipulated for by the contract, and that the rights of the plaintiffs accrued upon that inspection as if it was the first, and therefore they were entitled to throw the shoes upon the hands of the defendants at Lille, under the implied term in the contract that, if the goods should be found not equal to sample on inspection, the plaintiffs might return them upon the defendants' hands at the time and place of inspection, although the time of inspection was by the wrongful acts of the defendants' servants become a time subsequent to the time of delivery, and the place of inspection was become different from the place of delivery.

BOVILL, C.J. My Brother Brett, therefore, has come to the same conclusion as to the result; and by the unanimous judgment of the Court the rule must be discharged.

Rule discharged.

Attorneys for plaintiffs: *Thomas & Hollams.*
Attorneys for defendants: *Venning, Robins, & Venning.*

1872
July 5.

WINCH *v.* THE CONSERVATORS OF THE THAMES.

Negligence—Corporation—Public Purposes—Liability to repair Towing-path.

4 App Cas 259
12 C.P.D. 388
395
5 Ex D 31

The defendants were a corporate body in whom were vested, by the Thames Navigation Act, 1866 (29 & 30 Vict. c. 89), certain powers and authorities for the preservation and improvement of the stream, bed and banks of the upper part of the Thames, including all powers and authorities before that Act vested in the commissioners appointed for the purposes of the upper navigation of the Thames under earlier statutes. From these statutes it appeared that there were originally owners and occupiers of towing-paths on the river banks who took toll for horses passing along them, and that such persons were bound to keep the towing-path in repair; and that by the statutes the commissioners had extensive powers of supervision and control over the towing-paths, and power to make orders respecting them and to regulate the toll to be taken by persons entitled to take it. They subsequently acquired by the statutes power to purchase and take lands compulsorily, and to execute works for the purposes of the navigation; and by the Act of 28 Geo. 3, c. 51, s. 6, were authorized themselves to take toll, for, amongst other things, the towing-paths purchased or hired by them. By the 35th Geo. 3, c. 106, ss. 18, 23, they obtained power to execute any works or repairs that they thought needful or proper, and to pay for them out of the rates and tolls, and also to make and establish a continued horse towing-path throughout the navigation, and to purchase land for that purpose. By the Thames Navigation Act, 1866, the defendants were authorized to take tolls and apply their funds to the expenses of the repair, &c., of the works vested in, acquired by, or constructed by them under the Act, and to carrying into execution the purposes of that Act and of the former Acts.

In consequence of a part of the bank on the upper navigation of the Thames being out of repair and giving way, some horses of the plaintiff, which were engaged in towing a barge, fell into the river and were drowned. The defendants had, in pursuance of the powers vested in them in 1866, made a parol arrangement with the owner of the soil of the towing-path, at the place in question, for the use of such towing-path at an annual rent, and having likewise acquired the use of the whole of the rest of the towing-paths along the river, they were in the habit of taking an aggregate toll for the use of the whole of the navigation and towing-path at Teddington Lock, which they had done in the present instance. The plaintiff having brought an action against the defendants for negligence in not keeping the towing-path in repair:—

Held, that the defendants had power under their statutes to maintain and repair the towing-path, for the use of which they were entitled to take a toll; that according to the decision in *Mersey Docks* v. *Gibbs* (Law Rep. 1 H. L. 93)(a), the intention of the legislature in such cases is that the corporation shall have the same duties, and its funds shall be subject to the same liabilities, as the general law would impose upon a private person having and exercising the same rights; and consequently that, the defendants having provided the towing-path under their Acts, having power under such Acts to maintain and repair it, and having invited the public to use it and taken toll for the use of it, were bound to take reasonable

(a) S C 12 Jur N.S. 571

1872

WINCH
v.
CONSERVATORS
OF THE
THAMES.

care that it was in a fit condition to be used as a towing-path; and that the action was maintainable.

The towing-path includes so much of the bank as is necessary and proper for the purpose of towing barges, and is reasonably and properly used as such.

Affirmed in Ex. Ch. L R 9 C.P. 379

THIS was an action against the defendants for negligence in the management and control of a portion of the banks and towing-paths of the River Thames, and in not maintaining them in a reasonable, safe, and proper condition for the purpose of towing barges, whereby certain horses of the plaintiff, employed in towing a barge upon the towing-path, for the use of which towing-path a toll had been paid to the defendants, fell into the river and were drowned. (1)

The trial took place before Cockburn, C.J., at the Surrey Spring Assizes, when a verdict was entered for the plaintiff for 100*l.* damages, leave being reserved to the defendants to move to enter the verdict for themselves, on the ground that no obligation or liability was cast on the defendants to repair and maintain the towing-path or that part of the bank which gave way. The facts as proved at the trial, and the statutes on which the question of the defendants' liability depended, are sufficiently set forth in the judgment.

A rule nisi was obtained in pursuance of the leave reserved, against which

June 4, 5, and 6. *Denman, Q.C.*, and *McLeod*, shewed cause. The statutes which regulate the powers and authorities of the defendants clearly impose upon them the duty of repairing the bank and towing-paths. It is likewise contended that the defendants having taken toll for the use of the towing-path, a liability is cast upon them at common law, independently of the statutes, to repair. The case of *Mersey Docks* v. *Gibbs* (2) is a distinct authority in the plaintiff's favour.

[BOVILL, C.J. The Acts appear to give power to the conser-

---

(1) It is unnecessary for the purposes of this report to set out the pleadings, inasmuch as it was agreed that the question of the defendants' liability should be considered apart from the form of the pleadings. There were demurrers to the counts of the declaration, which came on for argument with the rule, and were disposed of, as will appear by the judgment.

(2) Law Rep. 1 H. L. 93. [illegible]

1872

WINCH
v.
CONSERVATORS
OF THE
THAMES.

vators to acquire the right to the use of the towing-path for the public, and to take toll for the use of it. But it is not inconsistent with the Acts that a private owner might still be entitled to take toll for a portion of the towing-path. Must you not shew that there was a transfer of the owners' rights on the particular portion of the towing-path where the accident happened?]

It was proved that by arrangement with the owner he allowed the use of that part of the towing-path to the defendants at a certain annual rent, and the defendants in fact took one aggregate toll at Teddington for the use of the whole towing-path. It is true that this arrangement was only by parol licence, and that there was no regular demise, but it is submitted that this makes no difference with respect to the liability to repair arising from the fact of the defendants having taken toll for the use of this portion of the paths: *Nicholl* v. *Allen.* (1) It is not necessary that the corporation should in such cases acquire the soil in the towing-path: *Badger* v. *South Yorkshire Railway and River Dun Co.* (2) Here it must be taken that they acquired by the arrangement all things necessary for the exercise of their duties with regard to the navigation, which would include the right to repair the towing-path when necessary.

[They also cited *Stracey* v. *Nelson* (3) and *Parnaby* v. *Lancaster Canal Co.* (4)]

Hawkins, Q.C., and *Joyce*, supported the rule. It was proved that the plaintiff's horses were not on the usual beaten track which the horses follow in towing when the accident happened; they were close to the edge of the bank. The towing-path must be taken to be the established defined track: it cannot include the whole bank.

[BRETT, J. The towing-path must surely include so much of the bank as is reasonably used for the purposes of towing; it is impossible in towing barges up stream that all the horses should keep in one narrow track.]

It is submitted that the taking of tolls is no ground for making the defendants liable. There is no public right of towing on the river banks: *Ball* v. *Herbert.* (1) The toll was originally paid to the owner for the right to pass over his land. It does not follow that the owner was bound to repair the path because he took a toll. The public takes the path tale quale. The Acts merely give the defendants the power of buying up the tolls so that the public shall not be obliged to pay toll to each individual owner along the bank. But, admitting that there was a dedication to the public of the path as a highway for the limited purpose of towing on payment of a toll, this throws no obligation on the owner of the soil of the highway to repair. The parish must be liable to repair, if anybody is liable; but it is contended that in this case possibly no one is liable for the defective state of the towing-path which arose from the action of the river in undermining the banks. It is like the case of a road passing along the edge of a cliff which is destroyed by the action of the sea. The conservators are no more liable to an action for not obviating the effect produced by the river in the course of nature on the banks, than they are for not preventing the alteration of the bed of the river by the action of the stream, as in the formation of shoals, &c. See *Rex* v. *Inhabitants of Paul* (2), *Rex* v. *Inhabitants of Landulph.* (3)

---

(1) 1 B. & S. 916, 934; 31 L. J. (Q.B.) 43, 283.

(2) 1 E. & E. 347; 28 L. J. (Q.B.) 118.

(3) 12 M. & W. 535.

(4) 11 A. & E. 223.

(2) S.C. 5 Jur. N.S. 459.

It is contended that there are no provisions in the statutes which impose on the defendants the duty of repairing the towing-path. If there be such a liability the proper remedy is by indictment, as in the case of non-repair of a highway, and not by action at the suit of a private individual: see *Parsons* v. *St. Matthew, Bethnal Green* (4); *Robbins* v. *Jones.* (5) Moreover, the defendants had acquired only the right as against the owner of using the towing-path on payment of a rent. There was no provision that they might repair the banks. If they had repaired the banks they would have been committing a trespass against the owner.

The defendants acted only as trustees for the benefit of the public in collecting the tolls. The present case is distinguishable from *Mersey Docks* v. *Gibbs.* (6) There was there merely a substitution for the private enterprise of individuals of a corporation formed for the purpose of profit and for the benefit of the town and neighbourhood. The commissioners of the upper navigation of the Thames were originally in the nature of a court of justice. Their function was merely to see that exorbitant tolls were not taken, and to regulate the amount of the tolls; at that time they could not be liable to repair the banks. The subsequent statutes, for convenience sake, give them the power of buying up the tolls and levying the tolls themselves. There is nothing to shew that it was ever intended to impose on them the liability to repair the banks.

---

(1) 3 T. R. 253.

(2) 2 Mood. & Rob. 307.

(3) 1 Mood. & Rob. 393.

(4) Law Rep. 3 C. P. 56.

(5) 15 C. B. (N.S.) 221; 33 L. J. (C.P.) 1. /10 Jur N. [illegible]

(6) Law Rep. 1 H. L. 93. /12 Jur N.

Cur. adv. vult.

July 5. The judgment of the Court (Bovill, C.J., and Byles and Brett, JJ.) was delivered by

BOVILL, C.J. The defendants in this action were charged with negligence in the care, management, and control of a portion of the banks and towing-paths of the river Thames, and in not keeping and maintaining them in a reasonably safe and proper condition for the purpose of towing barges, whereby certain horses of the plaintiff employed upon the towing-path in towing a barge, and for the use of which towing-path toll had been paid to the defendants, fell into the river and were drowned.

The principal question of law which arose at the trial, and was reserved for the consideration of the Court, was, whether under the Acts of Parliament which regulate the upper navigation, or by force of those Acts and the application of the common law, the defendants were under any legal liability with respect to the maintenance and repairs of the towing-paths or the river banks.

The defendants are a corporation constituted for the purposes of the upper navigation of the Thames by the Thames Navigation Act, 1866 (29 & 30 Vict. c. 89), having been originally incorporated for other purposes by the Thames Conservancy Act, 1857, (20 & 21 Vict. c. cxlvii.). By s. 26 of the Act of 1866, the previous Acts relating to the upper navigation were to remain in force, and to be construed as if the present body of conservators had been named therein instead of the former commissioners; and it therefore becomes necessary to examine the provisions and the language of the earlier statutes.

The first statute which appointed commissioners, 24 Geo. 2,

c. 8, in the preamble refers to abuses by the *owners of the towing-paths* and other passages on the banks of the river. Sect. 2 gives powers to the commissioners to settle, amongst other things, the rates to be taken by the *tenants or occupiers of the towing-paths, locks,* &c., and to *regulate the towing-paths,* &c., for the benefit and safety of the navigation, making compensation to owners or occupiers of mills or land; and they were also to give such reparation, satisfaction, and damages to persons grieved, as to them should seem meet; but with an express proviso by s. 3 that they should not change the towing-paths or landing-places without consent of the landowners.

The 4th section provided for the mode of proceeding by the commissioners in making orders.

By s. 8 power was given to the commissioners to view the *towing-paths,* &c., *to inquire into their state and condition, and to make orders thereupon,* giving notice to the persons concerned of their intended orders.

Sect. 9 imposed a penalty on persons disobeying the orders of the commissioners; and by s. 11 parties aggrieved by any such orders might within eight months appeal against them to the judges of assize, or of nisi prius in Middlesex.

The next Act was 11 Geo. 3, c. 45, the title of which was "For improving and completing the navigation;" and it refers to *the abuses and exactions of the owners of several towing-paths* and other passages on the banks of the river, and of the locks, &c. It also refers to an estimate which had been made of the expense of (inter alia) embanking divers parts of the river, and for purchasing lands for the making of towing-paths in order to complete the navigation; and by s. 7 power is given to the commissioners to *purchase and make towing-paths,* &c., for towing with horses or otherwise, to settle the *rates to be taken for the use of the towing-paths, &c., by the tenants or occupiers of the same;* and they were *to have regard* (amongst other things) *to the expense of repairing and supporting the towing-paths,* &c., and to make orders as to the towing-paths, &c., making satisfaction to the owners of mills and lands, and giving reparation, satisfaction, and damages to parties aggrieved, in the same terms as in the former Act.

By s. 19 they had power to *view the towing-paths,* &c., and *the* *estate, condition, reparation, and circumstances thereof*, and to make orders, as in the previous statute, giving notice of their intention to do so to the persons concerned; and by ss. 28, 29, and 31 the commissioners acquired compulsory powers to purchase property necessary for the purposes of the Act, subject to certain consents in the cases specially mentioned in ss. 31 and 33; and such *purchases*, by s. 28, might be made in consideration of *a sum in gross*, or of *an annual rent* to be secured as mentioned in the Act; and the contracts, conveyances, and assurances were to be enrolled with the clerk of the peace.

The commissioners had very large powers conferred upon them for regulating not only the navigation but also the tolls and lock-dues as well as the rates for carriage of goods and hire of horses upon the river, and with authority to determine all complaints, subject to appeal. It also appears from s. 24, as well as from the 7th section, that in some places there were at that time no horse towing-paths, and that the towing had there been done by men, but that the extension of the horse towing-paths was then contemplated. There are powers given to the commissioners to borrow money on the security of the tolls; and by s. 55 there is a general power to appeal to the quarter sessions against any orders of the commissioners.

The next Act which is material is 28 Geo. 3, c. 51. The preamble refers to money having been raised and expended in making horse towing-paths, &c.; and by s. 2 the tolls and moneys to be raised or paid under that Act or the former Acts, and the property in the lands and works erected or purchased by the commissioners, were *vested* in them, and they were impowered to sue and prosecute for injury to any of the towing-paths, &c., by virtue of the Acts purchased, rented, *hired*, or used for the benefit of the navigation.

By s. 5 they had further borrowing powers conferred upon them; and by s. 6 it is enacted that for providing a *fund* for securing the money borrowed, with interest, and for *repairing and maintaining the navigation*, the commissioners shall have power to settle and direct *the taking of such tolls* and rates as they shall think necessary, within certain limits, for barges, and also for horses used in towing, *for the use of* (inter alia) *the towing-paths and ways then or* *to be thereafter made, purchased, or hired* by the commissioners on the navigation.

The commissioners, by s. 18, had power to make bye-laws as to the rates for towing, for the use of any towing-paths, and for carrying on, repairing, and regulating the navigation, subject to the general power of appeal given by s. 24.

By 35 Geo. 3, c. 106, s. 18, further powers were given to five of the committee to survey and view the river, and *to hear and examine evidence as to the state and condition of the navigation, and the wants of repairs, amendments, alterations, and improvements therein*, and to make reports to the general meetings of the commissioners of all alterations, improvements, repairs, and other works which they should think needful or proper to be done at any place or places for the benefit and improvement of the navigation, and to cause estimates to be made of the expense of doing such works; and when the commissioners ordered any works the committee of five of them might take on themselves the management, direction, and execution of them, and give orders to the surveyors and others to proceed in the execution of such works, and the expenses, after having been reported and allowed by a general meeting of the commissioners, were to be paid out of the moneys raised under the Acts.

By s. 22 the commissioners were to make satisfaction to parties aggrieved, damaged, or injured by the works, and with a power of appeal as there provided.

The 23rd section authorized the purchasing and making by the commissioners of a *free, continued, uninterrupted*, and *public* horse towing-path throughout the whole of the navigation, without interruption or impediment, the commissioners making compensation for the lands taken, and for all losses and damages by reason of the taking of lands or grounds for making a towing-path, way, or road for the use of the navigation.

The next and last Act was that by which the powers, rights, and duties of the commissioners were transferred to the present defendants, viz., the Thames Navigation Act, 1866. The title of that Act is "An Act for vesting in the Conservators of the Thames the Conservancy of the upper part of the River;" and some of the objects for which the defendants were thereby incorporated, as mentioned in the preamble, were "the preservation and improvement of the streams, bed, and banks of the upper part of the Thames, as a matter of great local and public importance." The Act recites that the locks and works under the previous control of the commissioners were in a very bad and dangerous condition, and that their income had long been insufficient to defray *the necessary expenses of the repair and maintenance* of the locks and works, and that considerable debts had been incurred by the previous commissioners.

By ss. 25, 26, and 30, the powers, authorities, rights, and interests, duties and obligations of the former commissioners were transferred to the defendants.

As to certain locks, dams, and weirs existing on the navigation before the passing of the Act of 1866, the owners of them were entitled to take toll, and were bound to repair them; but by this Act the traffic was relieved from the tolls payable to these private owners, the property in these locks, dams, and weirs was transferred to and vested in the defendants; and the obligation to maintain and repair them was by express words imposed upon the defendants: see the preamble, and s. 43 of this Act.

By s. 55 the defendants were authorized to take tolls and charges for the navigation, and under s. 70 to borrow money on the security of the tolls; and their funds were to be applied by the defendants under s. 88, first, inter alia, in defraying the expenses of *the repair and maintenance of the works* vested in or acquired or constructed by them by or under that Act, and sixthly, in *carrying into execution the purposes of that Act.* There are no words directly imposing the obligation to repair the banks and towing-paths upon the defendants, as is the case with respect to the locks, dams, and weirs by s. 43; but then the towing-paths and the right to take tolls for passing along them are not absolutely transferred to the defendants in the same manner as the locks, dams, and weirs; so that there was no necessity for any such express enactment with respect to the towing-paths; and the powers, rights, duties, obligation, and liability of the defendants with respect to the towing-paths and banks must be ascertained by reference to the provisions of the former Acts, as well as to the general scope and language of this Act.

It appears from the earlier Acts already mentioned that originally there were *owners*, and by subsequent Acts *tenants or occupiers of towing-paths*, who took toll for horses passing along them, and that *such persons were bound to keep the towing-paths in repair;* and by those statutes the commissioners had extensive powers of supervision and control over the towing-paths, and power to make orders respecting them, and to regulate the toll to be taken by the persons entitled to take it. They subsequently acquired power to purchase and take lands compulsorily, and to execute works for the purpose of the navigation, and by the Act of 28 Geo. 3, c. 5, s. 6, were authorized *themselves to take toll for*, amongst other things, *the towing-paths purchased or hired by them;* and there are similar expressions in the next section as to towing-paths purchased or hired by the commissioners.

By the later Act of 35 Geo. 3, c. 106, ss. 18 and 23, they obtained power to execute any works or repairs that they thought needful or proper, and to pay for them out of the rates and tolls, and also to make and establish a continued horse towing-path throughout the navigation, and to purchase land for that purpose. And by the last Act, of 1866, the present defendants are authorized to take the tolls, and by s. 88 are bound to apply their funds,—first, in defraying the expenses of the repair and maintenance of the works vested in or acquired or constructed by them under that Act; and, sixthly, in carrying into execution the purposes of that Act, which, as it incorporates, necessarily includes the purposes of the former Acts. Those purposes, as stated in the preamble of the last Act, as well as in the former Acts, are, the preservation, repairs, maintenance, and improvement of the navigation, and which would, we think, include the banks and towing-paths.

The defendants, in pursuance of the powers vested in them, made arrangements in 1866 to secure the use of the towing-path at the place in question for the purpose of the navigation; and it was agreed on the argument that the defendants under that arrangement now pay an annual rent per rod to the owner of the soil of the towing-path, and take an aggregate toll in one sum at Teddington Lock for the use of the entire navigation and towing-paths: and it is to be taken as a fact that the defendants have under the provisions of the statute acquired and have the use of

1872

WINCH
v.
CONSERVATORS
OF THE
THAMES.

the whole of the towing-paths along the river, and the right to take toll in respect of the use of them, as well as for the use of the navigation generally.

Somewhat similar Acts of Parliament were under consideration in the case of *Badger* v. *South Yorkshire Railway and River Dun Co.* (1), and the navigation company there, as in this case, appeared to have paid an annual sum to the owner of the towing-path, in order to secure the use of it for the public. It was considered by the Court of Exchequer that the company had thereby acquired the soil in the towing-path; but this decision was afterwards reversed by the Exchequer Chamber; and that Court decided that the company had acquired only an easement over the towing-path, such as was necessary for the purposes of the undertaking, and that the arrangement for payment of an annual sum was a purchase within the meaning of the statutes. The Court of Exchequer Chamber also laid down that, generally speaking, in the absence of express words, the Courts were not inclined to infer that statutes of this kind gave more than such a use of the soil as was necessary for the purposes of the navigation; and a similar view was taken by the Court of Exchequer in the case of *Stracey* v. *Nelson* (2); with respect to commissioners of sewers.

It is quite true that the arrangement in the present case between the commissioners and the owner of the towing-path was by parol only; but the owner of the land letting the right to use the towing-path, and receiving a rent for it, must be taken to know the powers of the conservators, and to have assented that they might do that which was necessary to enable the public to have and enjoy the use of the towing-paths, including the power to repair them, upon the same principle that, where the use of a thing is granted, everything is granted by which the grantee may have and enjoy such use: *Pomfret* v. *Ricroft.* (3) And with respect to a question which was raised as to what is to be deemed the towing-path, it seems to us that it is impossible to confine it to the mere beaten track which is described to have been made principally by single horses towing down stream, for, in towing up stream, the horses cannot always be in a direct line, and there must be space for them as well as for the driver and for the proper use of the tow-line; and we think the towing-path must be taken to include so much of the bank as is necessary and proper for the purposes of towing barges, and is reasonably and properly used as such, and which in this case would include that part of the bank which gave way.

---

(1) 1 E. & E. 349. [illegible]

(2) 12 M. & W. 535.

(3) 1 Wms. Saund. 322.

The defendants having acquired the towing-path in the manner before mentioned for the use of the public, subject to the payment by the public of the toll to them, they invited the public to use the towing-path and to pay them the toll. They have also employed their superintendent and their engineer from time to time to inspect and report on the banks and towing-paths; and it was proved to be part of the duties of the engineer to see if the banks were being washed away.

The plaintiff in this case was lawfully using the towing-path with his horses in towing a barge, for which the proper toll had been paid to the defendants and for the purpose of the navigation.

It was alleged by the plaintiff that the towing-path was in an unsafe and dangerous state, and that in consequence his horses fell into the river and were drowned; whilst the defendants alleged that the bank was in a safe and proper condition, and that the accident arose from the fault of the driver of the horses or of the man who had charge of the barge. No question was raised (indeed, upon the evidence there was no ground for contending), that, if the bank was in a dangerous state, and it was the defendants' duty to maintain it, they had been guilty of negligence in that respect.

The case having been left to the jury, they found that the towing-path and banks were not in a proper condition relatively to the purpose and proper use of them as a towing-path; that this was the cause of the accident to the plaintiffs' horses; and that there was no neglect in the navigation of the barge or in the management of the horses. The verdict was thereupon entered for the plaintiff for 100*l.*, the value of the horses, subject to the point which was reserved as to the liability of the defendants in point of law; and this question was to be raised without reference to the particular form of the pleadings.

1872

WINCH
v.
CONSERVATORS
OF THE
THAMES.

A rule was accordingly obtained by the defendants to enter the verdict in their favour; and upon the argument the plaintiff contended that the case fell within the principle which was established by the case of *Mersey Docks* v. *Gibbs.* (1) In that case it was laid down that the general rule of construction of statutes like the present was, that, in the absence of something to shew a contrary intention, the legislature intends that the body created by the statutes shall have the same duties, and that its funds shall be subject to the same liabilities, as the general law would impose upon a private person having and exercising the same rights; and that the trustees in that case were bound to take reasonable care that their works were in such a state as that the public might use them without danger.

In the case of *Nichol* v. *Allen* (2), it was held that a person being authorized to make a bridge, and to take a toll upon it, was liable to repair it, upon the principle that, taking the benefit of the tolls, he must bear the burthen of the repairs; and it was considered that the statutes in that case contemplated that both the tolls and the liability to repair should go together. This was also in accordance with the decision in the earlier case of *Mayor of Lyme Regis* v. *Henley* (3), and was confirmed by the case of *Parnaby* v. *Lancaster Canal Co.* (4), and the decision of the House of Lords in the *Mersey Docks Case.* (5)

Upon the true construction of the statutes in this case,—construed according to the rule laid down in the cases cited,—we are of opinion that the defendants had power to maintain and repair the towing-path. They had provided that towing-path under the Acts of Parliament for the use of the public; they invited the public to use it; and they took a toll, as they are authorized to do, for the use of it; and it appears to us, therefore, that they were bound to take reasonable care that the towing-path was in a reasonably fit condition to be used as a towing-path, and that the present case does fall within the principle of the decision in *Mersey Docks* v. *Gibbs* (1) and the other cases to which we have referred, and must be governed by them.

---

(1) Law Rep. 1 H. L. 93./11 Jur. N.S. 571/

(2) 1 B. & S. 916; 31 L. J. (Q.B.) 43; in error, 1 B. & S. 934; 31 L. J. (Q.B.) 203.

(3) 1 Bing. N. C. 222; 2 Cl. & F. 331.

(4) 11 Ad. & E. 230.

(5) Law Rep. 1 H. L. 93./11 Jur. [illegible]

It is also to be observed that, after having acquired the right to use the towing-path from the owner of the soil, and having the power themselves to repair and maintain it, it would be very strange if they were at liberty to make orders upon the owner to do the repairs, whilst they received the toll from the public.

It was contended for the defendants that there was no public right of towing on the banks of the river; and the case of *Ball* v. *Herbert* (1) was relied upon by the defendants in support of this view; but that case only decided that there was no such right *merely at common law;* and the decision, in fact, affirmed that there may be, and in fact is, on most navigable rivers, such a public right by custom, and that slight evidence of usage would generally be sufficient to support it on the ground of the public convenience.

We see no objection to a dedication of a way to the public for such a limited purpose: and in *Rex* v. *Severn and Wye Navigation* (2), Holroyd, J., and Bayley, J., both laid it down, and we think correctly, that a towing-path may be a highway, to be used only for the purpose of towing barges or vessels.

It was further contended that, if a public right of way existed for the purpose of towing, the parish alone had the power and were liable to the duty of repairing it; but we can find no sufficient grounds in fact or law, under the circumstances of this case, and upon the proper construction of these statutes, for supporting that contention: nor is this case like some which were suggested, such as that of a road washed away by the sea, where no person or body may be liable to repair or restore it. The authorities to which we have already referred seem effectually to dispose of this point.

It was further contended that, if there was a public right of towing upon the river banks, and the defendants were bound to repair them, the only remedy for breach of that duty was by indictment; and that no action could be maintained by an individual. But, if the duty of keeping the towing-paths and banks in repair be imposed upon the defendants, and they have neglected that duty, we are at a loss to understand upon what principle it can be said that a person who has sustained a particular injury from such neglect, and which is not common to the public at

(1) 3 T. R. 253. (2) 2 B. & A. 648.

1872

WINCH
v.
CONSERVATORS
OF THE
THAMES.

large, is precluded from maintaining an action to recover damages for the injury which he has thus individually sustained. The cases before referred to are direct authorities in favour of the plaintiff upon this point also.

It was further contended that the defendants did not collect the tolls for their own advantage, but merely as trustees for the benefit of the public. But, in the *Mersey Docks Case* (1), that circumstance was held not to make any difference in principle with respect to the liability in such cases; and all the grounds upon which it was sought to distinguish this case from the previous cases have in our judgment entirely failed.

Some questions were raised as to the sufficiency of the declaration, and which are material only for the purpose of the demurrers; but, as the defendants denied their liability altogether, under any form of declaration, it was arranged that the plaintiff should be at liberty to make any such amendments as he might be advised, *consistently with the facts of the case and the finding of the jury*, and which he is still at liberty to make if he thinks fit.

Our decision upon the main point of the case is in favour of the plaintiff; and the rule obtained by the defendants to enter the verdict for them under the leave reserved at the trial will therefore be discharged, and judgment will be entered for the plaintiff on the demurrers, upon the present or the amended form of the declaration, at the option of the plaintiff.

The remaining point argued before us was that the verdict was against the weight of the evidence, and that there ought to be a new trial on that ground. Upon reading the notes of the evidence, we have not been able to satisfy ourselves that the verdict is so clearly against the weight of evidence that it ought to be set aside. But, at the same time, the Lord Chief Justice, before whom the cause was tried, has certified to us that he is dissatisfied with the verdict; and, under any other circumstances than those which have occurred, we should almost certainly have thought it right, in deference to such an opinion, that the case should undergo further investigation before another jury. But it must be remembered that this was a second verdict obtained by the plaintiff, and after the first verdict in his favour had been set aside. The

(1) Law Rep. 1 H. L. 93. 12 Jur NS 571

questions left to the jury were peculiarly matters within their province; the evidence upon them was contradictory; and, two special juries having, after the summing-up by the presiding judge, found their verdict upon all the points submitted to them in favour of the plaintiff; and as we see little or no probability that another jury would be likely to come to a different conclusion upon a third trial—we think we ought not to send the case down for trial again, and that the rule, so far as it relates to a new trial, should also be discharged.

Rule discharged.
Judgment on the demurrers for the plaintiff.

Attorneys for plaintiff: *Wilkinson & Howlett.*
Attorney for defendants: *Hall, for Frere & Co.*

KITSON *v.* HARDWICK.

May 30.

15 Ch D. 428
17 Ch D 171
172
[illegible]

Bankrupt—Liquidation—Sale of Debts, &c., to the Debtor—32 & 33 *Vict.* c. 71, s. 15, *sub-s.* 3; s. 111; s. 125, *sub-s.* 5—*Pleading—Departure.*

To an action for goods sold, &c., the defendant pleaded that since the cause of action arose, and before action, the estate of the plaintiff went into liquidation under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), and one B. was duly appointed trustee. The plaintiff replied that B. for good and valuable consideration sold, assigned, and transferred to him all the estate, causes of action, &c., vested in B. as trustee under the liquidation:—

Held, that the sale was warranted by s. 25, sub-s. 3, of the Act, and the plaintiff entitled to sue in his own name, under s. 111; and that the replication was no departure from the declaration.

ACTION for goods sold and delivered, goods bargained and sold, money received to the use of the plaintiff, and interest.

Third plea, that, since the alleged cause of action arose, and before action, to wit, on the 2nd of December, 1870, the plaintiff, then being unable to pay his debts, summoned a first general meeting of his creditors, and such meeting did, by special resolutions as provided in and by the provisions of the Bankruptcy Act, 1869 (1), duly declare that the said first general meeting be adjourned to the 7th of December then next, and at such adjourned meeting, held at an interval of not more than a week, to wit, on the 7th of December, 1870, it was resolved that the affairs of the plaintiff should be liquidated by arrangement, and S. J. Beswick was duly appointed trustee under the said liquidation.

---

(1) 32 & 33 Vict. c. 71.

Replication, that, after the said 7th of December, 1870, and after the passing of the alleged resolution, to wit, that the affairs of the plaintiff should be liquidated by arrangement, and after Beswick was duly appointed trustee under the liquidation as alleged, and before the action, Beswick for good and valuable consideration in that behalf sold, assigned, and transferred to the plaintiff all the estate, right and title, contracts, causes of action, and interests of and theretofore belonging to the plaintiff and then vested in Beswick as aforesaid; and that, by reason of the premises, and before the commencement of the action, the causes of action in the declaration mentioned were duly vested in the plaintiff, and that he was entitled to maintain the action.

Demurrer, on the ground that the claim in this action, being a chose in action, and having by force of the Bankruptcy Act, 1869, vested in Beswick, could not at law be assigned by him, so as to entitle the plaintiff to sue. Joinder.

Cave, in support of the demurrer. Sub-s. 5 of s. 125 of 32 & 33 Vict. c. 71 provides that all such property of the debtor as would if he were made bankrupt be divisible amongst his creditors shall vest in the trustee under a liquidation by arrangement; and sub-s. 7 provides that "the trustee under a liquidation shall have the same powers and perform the same duties as a trustee under a bankruptcy, and the property of the debtor shall be distributed in the same manner as in bankruptcy; and, with the modification hereinafter mentioned, all the provisions of this Act shall, so far as the same are applicable, apply to the case of a liquidation by arrangement in the same manner as if the word 'bankrupt' included a debtor whose affairs are under liquidation, and the word 'bankruptcy' included liquidation by arrangement; and, in construing such provisions, the appointment of a trustee under a liquidation shall, according to circumstances, be deemed to be equivalent to and a substitute for the presentation of a petition in bankruptcy, or the service of such petition or an order of adjudication in bankruptcy." Section 25, sub-s. 5, will be relied on in support of the contention that the trustee had power to sell the debts in question: under that provision the trustee may "sell all the property of the bankrupt (including the goodwill of the business, if any, and the book-debts due or growing due to the bankrupt) by public auction or private contract, with power, if he thinks fit, to transfer the whole thereof to any person or company, or to sell the same in parcels." The object of that provision manifestly is to enable the trustee to realize the estate of the bankrupt for the greatest advantage of the creditors; and it would open a door to fraud if he might sell the debts to the bankrupt himself. If such a course had been intended, it would have been enumerated amongst the things which the trustee may do. In Williams's Bankruptcy, 37, it is said that "some persons are incapacitated to purchase the bankrupt's estate. Under the old law, the assignees, a commissioner, a solicitor, and an auctioneer employed to sell, to the bankruptcy, were all held incapable to purchase: and such a sale, unless it seemed beneficial to the creditors, would be set aside and the property re-sold, and such improper purchaser would be charged with the loss on the re-sale, if any:" *Ex parte Lewis.* (1)

[WILLES, J. Does the prohibition extend to the bankrupt himself? (2) It seems to be founded upon the general rule that an agent shall not bid. An election seems to have been given to the assignee to set aside or affirm the transaction. In this case, the debtor is raising a question which the parties themselves do not raise.]

It must be contended that the sale is void, as being against the policy of the Bankrupt Act, and not merely voidable. The trustee cannot, without the consent of the creditors, employ the bankrupt to carry on the trade, s. 26; if he could sell the stock in trade or the book-debts to the bankrupt, the result would be that the property in them would under s. 15, sub-s. 3, devolve upon the trustee himself: "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him during its continuance," is made divisible amongst the creditors.

---

(1) Glyn & J. 69.

(2) See *Shipley* v. *Murshall*, 14 C. B. (N.S.) 566; 32 L. J. (C.P.) 258.

[illegible]

[Willes, J. In *Herbert* v. *Sayer* (1), it was held that, under 6 Geo. 4, c. 16, ss. 63, 127, and 1 & 2 Wm. 4, c. 56, s. 25, an uncertificated bankrupt might acquire property and contract for the benefit of his creditors, and sue in respect of such property or contract; and that a plea shewing the bankruptcy, &c., constituted no defence, unless there were an allegation that the assignees had interfered. Suppose the bankrupt were an actor, and after his bankruptcy and before his final discharge he by his labour earned 100*l.*, and therewith bought from the trustee the dresses, &c., necessary for his profession; the trustee clearly could not take the 100*l.*; could he take the dresses, &c., from him?]

Probably not. The sale contemplated by s. 25, sub-s. 5, regard being had to the state of the law under the earlier Bankrupt Acts, evidently was, a sale to some person other than the bankrupt himself.

Then, the replication is a departure from the declaration. In Stephen on Pleading, 7th ed. 362, after referring to some examples of departure, it is said: "These, it will be observed, are cases in which the party deserts the ground in point of *fact* that he had first taken. But it is also a departure, if he puts the same facts on a new ground in point of *law;* as, if he relies on the effect of the common law in his declaration, and on a custom in his replication; or on the effect of the common law in his plea and a statute in his rejoinder." (2) So, here, the plaintiff in his declaration relies on a common-law liability arising out of the position of purchaser and vendor; whereas, the replication sets up a statutory title distinct from the title at common law.

[Willes, J. Does not the purchase from the trustee, like the re-indorsement of the bill of lading in *Short* v. *Simpson* (3), place the plaintiff where he was? In that case the point as to departure was given up.]

That case turned upon the effect of the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97. The plaintiff should have declared as assignee of the trustee; that would have given the defendant an opportunity of traversing the title of both.

---

(1) 5 Q. B. 965.

(2) Citing *Mole* v. *Wallis*, 1 Lev. 81, and *Fulmerston* v. *Steward*, Plowd. 102.

(3) Law Rep. 1 C. P. 248.

[KEATING, J. The defendant was an original debtor, and liable to both.]

The case of a reverter is provided for by s. 81.

A. L. Smith, contrà, was not called upon.

WILLES, J. This case has been well and ingeniously argued; but I think we are bound by the terms of the Act to hold in favour of the plaintiff. The action is brought by one whose estate is in liquidation under 32 & 33 Vict. c. 71, for a debt which was due to him before the liquidation. The plea sets up the liquidation and the appointment of a trustee as an answer to the plaintiff's right to sue. The replication alleges that, after the liquidation and before action, the trustee for good and valuable consideration assigned and transferred to the plaintiff all the estate, right and title, contracts, causes of action, and interests of and theretofore belonging to the plaintiff and then vested in the trustee. To this replication there is a demurrer. The Act of Parliament, by s. 125, sub-s. 5, vests all the property of the bankrupt (or the person whose estate is in liquidation) in the trustee, and there must be some statutory authority for any other person than the trustee suing therefor. That is found in s. 25, sub-s. 5, which impowers the trustee to sell the property and book debts of the bankrupt, and in s. 111, which enables the transferee to sue in respect of them in his own name. Even without this latter provision, I should have thought the right to sue would exist; for, where the law allows the assignment of a chose in action, the power to bring an action in respect of it necessarily follows. However, there is that express provision in s. 111, that "*any* person to whom any thing in action belonging to the bankrupt is assigned in pursuance of this Act, may bring or defend any action or suit relating to such thing in action in his own name." The plaintiff, therefore, provided he is a person to whom it was competent for the trustee to sell this debt, may bring an action to recover it in his own name. But Mr. Cave insists that the plaintiff is not a person to whom the trustee could sell. In the first place, he says that the policy of the Act forbids such a transaction; and, in the next place, that it is excluded by the necessity of the case, because the effect would be immediately to revest in the trustee that which he had sold.

With regard to the argument that it is against public policy, or the policy of the bankrupt law, that the trustee should sell the property or debts to the bankrupt, I apprehend we must first look at the language of the Act itself. That, by s. 125, allows the creditors to appoint a trustee, who is to act for them in the realization and distribution of the estate, and by sub-s. 7 is to have all the powers of a trustee under a bankruptcy. One of those powers is (s. 25, sub-s. 6) "to sell all the property of the bankrupt (including the goodwill of the business, if any, and the book-debts due or growing due to the bankrupt) by public auction or private contract, with power, if he thinks fit, to transfer the whole thereof to any person or company, or to sell the same in parcels." If the trustee offers the property for sale by public auction, the more bidders there are the better. I do not see why the bankrupt himself should be precluded from bidding. The trustee, the auctioneer, or any one bearing a fiduciary character in reference to the estate is precluded from becoming a purchaser, by the general policy of the law, which prohibits an agent from selling to himself. It would be to the disadvantage of the principal, and therefore is forbidden by law, and is voidable provided the person interested thinks fit to avoid the transaction. In such a case, the Court of Bankruptcy would, I apprehend, first inquire whether or not the sale would be for the benefit of the creditors. Until that inquiry had been entered into, the sale would not be void. I can conceive many cases in which it would be highly desirable that the bankrupt should have an opportunity of becoming the purchaser of the stock in trade and book-debts. Having had much experience in bankruptcy, I have seen the advantage of giving the debtor a chance of getting back the business, especially where it is one which depends upon the personal influence or skill of the individual. In many cases a higher price might be obtained from him than a stranger would be willing to give. We are bound to put the ordinary construction upon the words of the Act, unless the doing so will be manifestly inconsistent and contrary to the general scope and policy of the legislation: and, when the Act says that the

1872

KITSON
v.
HARDWICK.

17 ChD 172

trustee may sell the estate to any person, and that any person buying may sue in his own name in respect of it, I see nothing inconsistent or contrary to the policy of the Act in holding that a sale to the bankrupt himself is not even voidable.

Assuming, then, that the trustee may sell to the bankrupt, let us see what would be the consequences of such a sale. It is said that the property would immediately revest in the trustee. That argument is founded upon s. 15, sub-s. 3, which enacts that the property of the bankrupt divisible amongst his creditors shall comprise, amongst other things, "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him during its continuance." It is said that this debt is property acquired by the debtor pending the liquidation. That at first sight would seem to be a plausible argument. But I apprehend the law is not so stringent and unjust. There is some property which a bankrupt may deal with, and which cannot be claimed by the trustee. For instance, the proceeds of his manual labour. These he may clearly hold; and with these he might purchase the goods or the debts from the trustee, and the trustee could no more seize the goods than he could the money itself. For this I need only refer to *Sir Thomas Palmer's Case*. (1) The following summary of the law upon this subject is given in Smith's Mercantile Law, 8th ed. 646, 647: "The trustee takes not merely the bankrupt's personal property, but also all such as may be acquired by or devolve on him during the continuance of the bankruptcy. He has, however, an interest in it subject to this right, and is entitled to recover it from strangers, if the trustee do not interfere, which he may do even after the bankrupt has commenced an action for the property. The trustee, indeed, has no right to seize the profits of his personal and daily labour, for that would be to deprive him of the means of existence; and it was held in one case that he might recover a compensation for such labour against his assignee who had employed him: but a bankrupt who acts as a furniture-broker and employs men and vans, or who attends as an apothecary and furnishes medicine, cannot be considered as merely using his personal labour in this sense." It is obvious, therefore, without relying upon *Herbert* v. *Sayer* (1), that the debtor in this case may hold and may sue for property so sold to him. Upon this replication we must assume that the sale was bonâ fide and for a good and valuable consideration. There is no re-vesting in the trustee, and nothing to prevent the plaintiff from suing.

---

(1) 5 Co. Rep. 24 b.

Then it is said that there is a departure. The plaintiff, it is said, relying on a common law right, declares for a debt which was originally due to him, and which remains due to him down to the present moment; whereas, in his replication, he relies upon a statutory right. And this is said to be a departure. I think that is a fallacy. All that the replication amounts to is that by means of a purchase from the trustee, the plaintiff has got rid of a claim which might have interfered with his right to sue for this debt. No one of the cases relied on by Mr. Cave amounts to an authority for saying that that is a departure.

Having gone through all the points which have been urged on the part of the defendant, it seems to me that they fail to afford an answer to this action, and therefore that the plaintiff is entitled to judgment.

KEATING, J. I am of the same opinion; and I entirely concur in the reasons given by my Brother Willes.

Judgment for the plaintiff.

Attorney for plaintiff: *F. T. Girdwood, for B. C. Pullan, Leeds.*

Attorneys for defendant: *Jacobs, North, & Vincent, for North & Sons, Leeds.*

---

(1) 5 Q. B. 965.

HARRIS AND OTHERS *v.* SCARAMANGA AND OTHERS.

Marine Insurance—Foreign Average Statement.

1872
June 3.

9 CP 464-6, 7
— 595 601-5
605
10 CP 415
5 QBD 273

A cargo of rye was insured for 4160*l.* from Taganrog to Bremen. The policy contained the usual memorandum, "Corn, &c., are warranted free from average unless general or the ship be stranded," &c., and in the margin were the following conditions,—"*To pay general average as per foreign statement, if so made up.* Warranted free from particular average unless the ship or craft be stranded, sunk, or burnt; but this warranty not to exonerate the underwriters from the liability to pay any special charges for mats, warehousing, forwarding, or otherwise, if incurred, as well as partial loss arising from transhipment. Warranted free from capture and seizure and the consequences of any attempt thereat."

After leaving Taganrog, the vessel encountered severe weather, and was compelled to put into two several ports for repair, at each of which the captain, in order to enable him to obtain funds to put her in a condition to continue her voyage, gave a bottomry-bond on ship, freight and cargo, the aggregate of which, with interest, on the arrival of the ship at Bremen, amounted to 2818*l.* 10*s.* 5*d.* The captain being unable to discharge this obligation, the consignees of the cargo, in order to obtain delivery thereof, paid the amount.

On the 3rd of August, 1868, a statement was prepared by an average-stater in Bremen, in which the loss arising upon the bottomry-bonds was apportioned between the ship and freight and the cargo, as follows:—1088*l.* 14*s.* 11*d.* as falling upon the cargo, and 1185*l.* 11*s.* upon the ship and freight. The captain being unable to pay or give security for the 1185*l.* 11*s.* so charged upon ship and freight, the vessel was sold under an order of the Tribunal of Commerce at Bremen, and produced 729*l.* 10*s.* 2*d.*, leaving a balance due to the holders of the bonds (the 1088*l.* 14*s.* 11*d.* having been paid) of 663*l.* 2*s.* 10*d.* On the 3rd of October a "further or supplemental average-statement" was made by the average-stater, in which the last-mentioned sum was stated as "the amount which the cargo had to pay as additional bottomry debt" to the holders of the bonds. These "average-statements" were (upon a special case) admitted to be accurate, and "correctly made up in accordance with the law in force in Bremen;" and it was further admitted that "such a loss as that which occurred in this case is treated at Bremen as a general average loss, and not as a particular average loss:"—

Held, that the underwriters were bound by the average-statements so made, and consequently that the assured were entitled to recover the 663*l.* 2*s.* 10*d.*

SPECIAL CASE stated for the opinion of the Court, pursuant to a judge's order.

The action was upon a policy of insurance for 4160*l.* upon a cargo of rye on board the *Bella Leandra*, at and from Taganrog to Bremen, to recover a loss of 663*l.* 2*s.* 10*d.* The policy contained the usual memorandum: "Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general or the ship be

Followed in Mavro v Ocean Marine Insurance Co
LR 9 CP 595. 10 CP. 414

stranded. Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under 5*l.* per cent.; and all other goods, also the ship and freight, are warranted free from average under 3*l.* per cent. unless general or the ship be stranded." The following conditions were inserted in the margin of the policy: "To pay general average as per foreign statement, if so made up. Warranted free from particular average unless the ship or craft be stranded, sunk, or burnt; but this warranty not to exonerate the underwriters from the liability to pay any special charges for mats, warehousing, forwarding, or otherwise, if incurred, as well as partial loss arising from transhipment. Warranted free from capture and seizure and the consequences of any attempt thereat."

The declaration contained special counts on the policy, for a general average loss, and on the suing and labouring clause, and for a loss according to a foreign average-statement made up within the terms of the policy, and also the common money counts. The defendants pleaded a denial of the general average loss and a denial of the loss under the suing and labouring clause, and that the claim upon the policy had been satisfied by payment, and never indebted to the money counts.

1. The plaintiffs and the defendants are cornfactors, and carry on their business respectively in London, where the policy in question was underwritten by the defendants.

2. The plaintiffs bought the cargo of rye of the defendants on behalf of their principals, Messrs. Bacmeister & Stone. Bacmeister & Stone sold the cargo to Kneist & Todeman, who again sold it to Bolte & Co., of Bremen. The policy and bill of lading of the rye were first handed by the defendants to the plaintiffs, who passed them on to their principals, Bacmeister & Stone. Thus, ultimately, the documents came into the hands of Bolte & Co., as final owners of the cargo.

3. The *Bella Leandra* was an Italian vessel. She sailed from Taganrog on the voyage insured on or about the 22nd of September, 1867, having the cargo of rye on board. After leaving Taganrog she encountered very severe weather, and was in the month of October, 1867, compelled to put into Constantinople, in distress. There the master, in order to raise the money necessary for repairs so as to enable the ship to continue the voyage, executed

a bottomry bond, dated the 17th of February, 1868, on the ship, freight, and cargo, to secure the repayment of 2120*l.* with maritime interest at 11 per cent., which on the ship's arrival amounted to 2353*l.* 4*s.*, to Hermann Helbing, merchant of Constantinople, who advanced him that sum. It was to be assumed for the purposes of the case that this bond (a translation of which was annexed) was valid and binding on the cargo.

4. The *Bella Leandra* sailed from Constantinople on or about the 23rd of February, 1868, and again met with very bad weather; and on or about the 26th of March, 1868, the captain was compelled to put into Malta, in distress. There, again, in order to raise the money necessary for repairs so as to be able to continue the voyage, the captain executed a bottomry bond, dated the 29th of April, 1868, on ship, freight, and cargo. The last-mentioned bond was for 442*l.* 15*s.*, with maritime interest of 5*l.* per cent., which on the arrival of the ship at Bremen amounted to 465*l.* 6*s.* 5*d.*, and was in favour of Ignazio Buttigeig, merchant of Malta. It was to be assumed for the purposes of the case that this bond (a translation of which was annexed) was valid and binding on the cargo.

5. Messrs. Bolte & Co., who are merchants carrying on business at Bremen, had in the meantime become the purchasers of the rye; and this action is brought by the plaintiffs as trustees for and on behalf of Bolte & Co.

6. The ship sailed from Malta on or about the 1st of May, and on or about the 25th of June she arrived at Bremen, Bolte & Co. being the consignees of the cargo.

7. The bond which was executed at Constantinople had been indorsed by Helbing to the order of Bolte & Co., who took it up; and on the arrival of the ship at Bremen the captain was unable to pay the same or any part thereof.

8. The bond which was executed at Malta had been indorsed by Buttegeig to the order of and was taken up by the defendants and by them indorsed to Fritz & Co. of Bremen; and, as the captain was unable to redeem the same, Fritz & Co. demanded payment thereof from Bolte & Co., the consignees of the cargo. Bolte & Co., in order to prevent the holders thereof from covering their claims by a sale of the cargo or some part of it, and in order to

obtain delivery of the cargo, took up the bond and paid off the holders thereof. By taking this course, which was the only course they could take, Bolte & Co. obtained delivery of the cargo.

9. A statement of average dated the 3rd of August, 1868, was prepared by Heinrich Fecklenborg, an average-stater in Bremen, in which the loss arising upon the bottomry bonds was apportioned between the cargo and the ship and freight. By that statement the amount of 1088*l.* 14*s.* 11*d.* was the proportion shewn as falling upon the cargo, and 1185*l.* 11*s.* was shewn as falling upon the ship and freight.

10. No question was raised as to the 1088*l.* 14*s.* 11*d.*, which it was admitted was properly chargeable on the defendants as underwriters on the cargo; and the defendants had paid the same to Bolte & Co. accordingly.

11. The captain was unable to pay or to give any security for the 1185*l.* 11*s.*, the proportion of the loss so falling on the ship and freight according to the said average-statement, or any part thereof.

12. Messrs. Bolte & Co., in order to obtain payment of the 1185*l.* 11*s.*, the proportion of the bottomry moneys so falling upon the ship and freight, applied to the Tribunal of Commerce at Bremen (being a court of competent jurisdiction in that behalf) to order the ship to be sold and the proceeds to be applied in or towards the liquidation of the amount. The Tribunal of Commerce duly made the order; and, after the requisite public notices had been given, the ship was with due observance of all legal forms sold by public auction by one G. Steinmeyer, a ship-broker at Bremen, on or about the 12th of September, 1868, under the order of the Tribunal of Commerce, for 4450 thalers gold, equal to 729*l.* 10*s.* 2*d.* sterling or thereabouts, being the highest price that could be obtained for her; and the net proceeds of the sale were handed over to Bolte & Co. under the order of the Tribunal.

13. After deducting the net proceeds of the said sale from the 1185*l.* 11*s.* so falling upon the ship and freight according to the average-statement of the 3rd of August, 1868, as aforesaid, there remained a balance of 663*l.* 2*s.* 10*d.* of the sum so as aforesaid falling on the ship and freight, in respect of which Bolte & Co. were still unsatisfied: and a further or supplemental average-

1872

HARRIS v. SCARAMANGA.

statement, dated the 3rd of October, 1868, was made up by Fecklenborg, in which the 663*l.* 2*s.* 10*d.* was stated as the amount which the cargo had to pay as additional bottomry debt to Bolte & Co. It was admitted that the last-mentioned average statement of the 3rd of October, 1868, as well as the former statement of the 3rd of August, was in all respects accurate as to amounts and figures, and was correctly made up in accordance with the law in force in Bremen.

14. Such a loss as that which occurred in this case is treated at Bremen as a general average loss, and not as a particular average loss. At Bremen the German code of commercial law is by legislative enactment in force. The sections of that code which enunciate the principles of law more particularly applicable to the present case are Articles 692, 695, 697, 735, 824, sub-s. 5, and 838, sub-s. 9. Either party was on the argument of the case to be at liberty to refer to a copy of the code which was identified by several witnesses under a commission sent to Bremen. The following is a translation of the above-mentioned articles:—

Art. 692. All the objects hypothecated are jointly and severally liable to the bottomry creditor. Even before his claim becomes due, the creditor can after the arrival of the vessel in the port of destination of the bottomry voyage apply for an arrest of all the bottomried objects.

Art. 695. The master shall not deliver the bottomried cargo, either entirely or partially, before the creditor has been paid or properly secured; otherwise, the master is personally answerable to the creditor for the bottomry debt so far as he could at the time of their delivery have been paid by the goods so given up. Until the contrary is proved, it shall be considered that the creditor could have been paid in full.

Art. 697. If the amount of bottomry is not paid when due, the creditor may apply to the proper court to order the sale of the ship and cargo on which bottomry has been taken, as also to hand over the bottomried freight. The action shall be brought, as far as the ship and freight are concerned, against the master or owner; as to the cargo, if before its delivery, against the master, after its delivery, against the consignee, so long as it is in his own possession or in the custody of any person holding it for his account.

Art. 734. If the master, in order to continue his voyage, for the purpose of an expenditure that does not come under general average, has hypothecated the cargo, or has disposed of the cargo by sale or by appropriation, the loss sustained by one proprietor of the cargo by reason that his claim for indemnification cannot be at all or cannot be fully satisfied out of the ship and freight (Art. 509, 510, 618) shall be borne by all the proprietors of the cargo, according to the principles of general average. In ascertaining the loss, the indemnification indicated in Art. 713 is applicable in relation to the proprietors of the cargo in all cases, especially also in the case of the second paragraph of Art. 613. For the value by which this indemnification is determined, the goods sold shall contribute to a general average, if such occurs.

Art. 735. The contributions to be paid under the stipulations of Art. 637 and Art. 734 are in all respects placed on the same footing as contributions in cases of general average.

Art. 824. The insurer bears all risks to which ship or cargo is exposed during the continuance of the insurance, if not otherwise determined by the following provisions, or by contract. He bears, in particular,—sub-s. 5,—the risk of the hypothecation of the insured goods for the purpose of continuing the voyage or of the disposal of the same by sale or by hypothecation for the like purposes (Art. 507, 510, 734).

Art. 838. The insurer is liable for,—sub-s. 1,—the contributions to general average, including those which the insured has to bear on account of a loss suffered by him. The contributions which by Art. 637 and 734 are subject to the principles of general average, shall be accounted tantamount to contributions to general average.

If ship and cargo are hypothecated together, each has to contribute its proportion towards the discharge of the amount for which they have been hypothecated, as if the loss were a general average loss; and, should the ship be unable to discharge its proportion of liability, the owners of the cargo would, in addition to discharging the proportion of liability attaching to the cargo, have to make up the deficiency as a general average loss.

This deficiency would be made good to the owners of the cargo by their underwriters, if the owners of the cargo had insured their interest. If this case, therefore, had been decided at Bremen, the defendants would have been held liable by the tribunals there to make good to Bolte & Co. the whole of the 663*l.* 2*s.* 10*d.*

15. The defendants refused to pay to the plaintiffs, as trustees for Bolte & Co., the 663*l.* 2*s.* 10*d.*, or any part thereof. The Court was at liberty to draw inferences of fact.

The question for the opinion of the Court was, whether the plaintiffs, as trustees for Bolte & Co., were entitled to recover from the defendants the 663*l.* 2*s.* 10*d.*, or any part thereof.

April 22. *Sir G. Honyman, Q.C.* (*M'Leod* with him), for the plaintiffs, submitted that the average statement of the 3rd of August, 1868, mentioned in par. 9 of the special case, and the further or supplemental statement of the 3rd of October, 1868, mentioned in par. 13, were "foreign statements" made up within the meaning of the memorandum in the policy, and that the

663*l.* 2*s.* 10*d.* claimed was a general average loss for which the defendants were liable under those "foreign statements," or one of them. [He referred to *Dent* v. *Smith* (1) and to the cases collected in Arnould on Insurance, ed. 1866, pp. 814, 820, et seq.]

Watkin Williams (with him, *Cohen*), for the defendants. The 663*l.* 2*s.* 10*d.* is not general average loss at all according to the law of this country,—not a loss from any of the perils insured against. Even according to the law of Bremen, it was not general average loss, nor is it so stated by the foreign average-stater, but an additional burthen imposed upon the plaintiff by reason of the failure of the ship-owner to pay the proportion of the bottomry debt charged upon the ship and freight. And, assuming it to be general average loss by the law of Bremen, it is not a loss by any peril insured against by this policy. The object of this memorandum was, not to add to or extend the risks which the insurers agreed to take upon themselves under the policy, but a mere provision that, if there be a general average loss arising from a peril insured against, the underwriters will pay it according to the foreign average-statement, if made. The underwriters agree to adopt the foreign law as to the statement of average, but only to pay general average when occasioned by the happening of a peril insured against according to the English law. [The following authorities were cited:—Benecke on Insurance, 165; 2 Parsons on Insurance, 431; *Power* v. *Whitmore* (2); *Hallett* v. *Wigram* (3); *Powell* v. *Gudgeon* (4); *Sarquy* v. *Hobson* (5); *Great Indian Peninsula* v. *Saunders* (6); *Booth* v. *Gair* (7); *Kidston* v. *Empire Marine Insurance Company.* (8) *Fletcher* v. *Alexander* (9) was also referred to.]

Sir G. Honyman, Q C., in reply. The defendants are bound by the finding in the 13th and 14th paragraphs that the statements made out by M. Fecklenborg on the 3rd of August and 3rd of October,

---

(1) Law Rep. 4 Q. B. 414.

(2) 4 M. & S. 141.

(3) 9 C. B. 580.

(4) 5 M. & S. 431.

(5) 2 B. & C. 7; in error, 4 Bing. 13.

(6) 1 B. & S. 41; 2 B. & S. 266; 30 L. J. (Q.B.) 218; 31 L. J. (Q.B.) 206. 7 Jur NS 812; 9 do 198

(7) 15 C. B. (N.S.) 291; 33 L. J. (C.P.) 99. 9 Jur NS 1386

(8) Law Rep. 1 C. P. 535; in error, Law Rep. 2 C. P. 357.

(9) Law Rep. 3 C. P. 375.

(8) S C 12 Jur NS 665.

1868, were "average-statements" according to the law of Bremen. He referred to *Dickenson* v. *Jardine.* (1)

Cur. adv. vult.

June 3. The judgment of the Court (Bovill, C.J., and Keating Brett, JJ.) was delivered by

BOVILL, C.J. This action was brought to recover from the underwriters on goods the amount of an alleged general average loss sustained by the plaintiffs as owners of a cargo of rye by the *Bella Leandra* insured on a voyage from Taganrog to Bremen.

Upon that voyage the vessel with her cargo on board having reached Bremen, *that* was the proper port for the adjustment of any claim or liability for general average, and the adjustment would have to be made there according to the law of Bremen, and would be binding as between the ship-owner and the owners of the cargo. It does not, however, necessarily follow that an underwriter upon an ordinary form of policy would be liable for the whole or even any part of the general average so adjusted. If the sacrifice or loss which occasioned the general average arose from any of the perils insured against or the consequences of them, or from proper endeavours to avert such perils or their consequences, to that extent the underwriters would, under the terms of an ordinary policy, and according to well-known maritime usage, be liable to indemnify the assured, though, as between the ship-owner and the owner of the cargo, matters might be introduced into the statement of general average for which the underwriters, upon the ordinary form of policy, would not be liable.

There are also many differences in the laws of various countries as to what are to be deemed the proper subjects of general average, as well as with respect to the proportions or value in or upon which the apportionment should be made; and under these circumstances the present policy was entered into with a special memorandum as to general average. By that memorandum, in addition to the ordinary insurance in the body of the policy, the underwriters agree "*to pay general average as per foreign statement, if so made up,*" with certain special warranties as to particular average and capture or seizure.

---

(1) Law Rep. 3 C. P. 639.

It seems to me that the general effect of the memorandum is, to make the underwriters liable as for general average for whatever the owners of the goods might be called upon to pay on that account by the foreign statement of adjustment. This memorandum was probably introduced in order to avoid all questions, not only as to the propriety of particular items being treated as the subjects of general average, but also as to the correctness of the apportionment; and I find it difficult to place any other reasonable construction upon the terms of the policy and memorandum.

If it be open to this Court to consider and determine the question whether the 663*l.* 2*s.* 10*d.* claimed in this action, or any part of it, was properly the subject of general average according to the law of England, I should be of opinion that it was not, and that this was not a loss covered by an ordinary policy in the usual form. So, if we had to determine whether this sum was strictly general average according to the law of Bremen as set forth in the special case, it might well be argued that it is not strictly general average, but is merely to be treated in a similar manner by the law of that place.

It seems to me, however, that, under the terms of this policy, the underwriters and the assured have both agreed to accept the adjustment and statement of the average-stater in the foreign port, if and when made, as conclusive between them, both in principle and in details, as to the loss which the underwriters are to undertake in respect of general average, subject to the exception of any matters, such as capture or seizure, which are excluded by the express terms of the policy.

In this case a maritime lien on the cargo was created by the bottomry-bonds, and which involved a liability of the cargo to make good any deficiency caused by the insufficient value of the ship to cover its own proportion of the bottomry debts; and the necessity for giving the bottomry-bonds and creating that lien arose from perils of the seas, though these debts would not necessarily be the subject of general average as against the underwriters, according to the law of England, or, possibly, by the law of Bremen. How, then, is the question to be determined, of whether the claim in this case is to be considered as general average for which the under-

1872

HARRIS
v.
SCARAMANGA.

writers are liable? Is it to be determined by this Court, or by the statement of the foreign average-stater?

It seems to me that, by the express agreement of the parties, contained in the memorandum, it is not open to us to determine it, and that we have only to see whether the foreign adjustment which gives rise to this claim has been in fact made or not. Has there, then, been such a statement of general average made in Bremen with respect to the amount now claimed? and how does the matter stand upon the facts as stated in the special case?

The plaintiffs contend that there was such a statement. The defendants, on the other hand, contend that there was no such statement, and that the passages in the case as to the statement of October do not treat it as a statement of general average, but as a mere calculation of the deficiency arising upon the sale of the ship, from the proceeds of that sale being insufficient to pay the amount apportioned to the ship and freight, and that this loss therefore cannot be considered as coming within the perils or terms of the policy.

Now, what are the statements in the special case upon this subject? In par. 13 it is said that a *further or supplemental average-statement*, dated the 3rd of October, 1868, *was made up* by the said H. Fecklenborg (who had been previously described as an average-stater in Bremen), in which the 663*l.* 2*s.* 10*d.* was stated as the amount which the cargo had to pay as additional bottomry debt to Messrs. Bolte & Co. (which is in accordance with the fact), and that a translation of the average-statement was annexed to and formed part of the case. It is further mentioned that *the last-mentioned average-statement* of the 3rd of October, 1868, as well as the former statement of the 3rd of August, was in all respects accurate as to amounts and figures, and *was correctly made up in accordance with the law in force in Bremen.* It is also stated in par. 14 that such a loss as that which had occurred in the principal case was treated at Bremen as *a general average loss*, and not as a particular average loss; and at the end of that paragraph it is further stated that, if this case had been decided at Bremen, the defendant would have been held liable by the tribunals there to make good to Messrs. Bolte & Co. the whole of the 663*l.* 2*s.* 10*d.*

Upon these facts thus stated, I am of opinion that the statement of the 3rd of October must be considered and treated by the Court as a foreign statement of general average made up at Bremen, within the terms of the special memorandum on this policy; and that, as neither of the exceptions or warranties is applicable to the case, the question of the liability of the underwriters to pay the amount now in question is conclusively settled against them; that it is not competent for this Court to inquire into the propriety of that foreign average-statement; and that our judgment therefore ought to be in favour of the plaintiffs.

In this view of the case, it becomes unnecessary to go through the authorities or to discuss the elaborate arguments which were very ably addressed to us by the learned counsel for the defendants. If his contention be correct, it would equally have entitled his clients to dispute each item in the original average-statement of the 3rd of August on the ground that it was not properly the subject of general average or that it did not arise from any of the perils covered by the policy. But it appears to me that the intention and effect of the policy and memorandum were that all such questions should be excluded in all cases where a foreign statement of general average had been made up, as it was in this case, at the proper port of adjustment abroad; and that the underwriters, by this policy, as between themselves and the assured, agreed to be bound by the opinion and decision of the foreign average-stater, both as to facts and law, on the subject of the general average in the statement which he might make up in the foreign port. I think the underwriters agreed to pay according to that statement, with the exception of any matters which are expressly excluded by other parts of the policy (but which are not applicable to this case), and that the plaintiffs are entitled to recover from the underwriters the whole of the sum claimed in this action.

My Brother Keating concurs in this judgment.

Brett, J. In this special case the question ultimately in dispute was, whether the plaintiffs, the assured, as trustees for Messrs. Bolte & Co., were entitled to recover from the defendants, the underwriters, a sum of 663*l.* 2*s.* 10*d.*

The plaintiffs, merchants in London, had insured with the defendants as underwriters in London, by a policy dated the 23rd of July, 1867, a cargo of rye on board the Italian vessel the *Bella Leandra,* on a voyage from Taganrog to Bremen. The vessel, after sailing on the voyage insured, was compelled by severe weather to put into Constantinople in distress; and the master there, in order to raise money necessary for repairs so as to enable the ship to continue her voyage, executed a bottomry-bond on the ship, freight, and cargo, to secure the repayment of 2353*l.* 4*s.* on the ship's arrival at Bremen. The ship, having sailed from Constantinople, was compelled by further severe weather to put into Malta in distress, and the master was there obliged to execute another and similar bottomry-bond on ship, freight, and cargo, to secure repayment at Bremen of 465*l.* 6*s.* 5*d.* The vessel arrived at Bremen, and the captain was unable to take up either bond. Messrs. Bolte & Co., who had become owners by purchase of the cargo of rye, took up both bonds, and, in order to obtain delivery of the cargo, paid off the holders of both. This was found by the case to be the only course by which the Messrs. Bolte & Co. could obtain possession of the cargo. The special case then found that "a statement of average," dated the 3rd of August, 1868, was prepared by an average-stater in Bremen, in which the loss arising upon the said bottomry-bonds was apportioned between the cargo and the ship and freight. By "the said statement" the amount of 1088*l.* 14*s.* 11*d.* was the proportion shewn as falling upon the cargo, and the amount of 1185*l.* 11*s.* was shewn as falling upon the ship and freight. No question, it was stated in the case, arises as to the sum of 1088*l.* 14*s.* 11*d.*, the proportion by that adjustment falling on the cargo, which it is admitted is properly chargeable on the defendants as underwriters; and the defendants have paid the same: but the captain was unable to pay or to give any security for the sum of 1185*l.* 11*s.*, the proportion falling on the ship and freight. Messrs. Bolte & Co. thereupon applied to the Tribunal of Commerce at Bremen to sell the ship, which was accordingly duly done, and the net proceeds of the sale were handed to Messrs. Bolte & Co. After deducting the said net proceeds from the sum of 1185*l.* 11*s.*, there remained a balance of 663*l.* 2*s.* 10*d.* in respect of which Messrs. Bolte & Co. were still unsatisfied. The special case then continued: And "a further or supplemental average-statement," dated the 3rd of October, 1868, was made up by the same average-stater, in which the said sum of 663*l.* 2*s.* 10*d.* was stated as the amount which the cargo had to pay as additional bottomry debt to Messrs. Bolte & Co. A translation, it was said, "of the last-mentioned average-statement" is annexed, &c. It is admitted that "the said last-mentioned average-statement" is correctly made up in accordance with the law in force in Bremen. "Such a loss as that which has occurred in the present case is treated at Bremen as a general average loss, and not as a particular average loss." It was admitted on the argument that the last paragraph was intended to apply to the loss of the 663*l.* 2*s.* 10*d.*

The case then stated that the German Code was in force as law at Bremen, and set out several sections or articles of the Code: and then it was stated as a fact that, according to that law, "if ship and cargo are hypothecated together, each has to contribute its proportion towards the discharge of the amount for which they have been hypothecated, as if the loss were a general average loss; and, should the ship be unable to discharge its proportion of liability, the owners of the cargo would, in addition to discharging the proportion of liability attaching to the cargo, have to make up the deficiency "*as a general average loss.*" This deficiency would be made good to the owners of the cargo by their underwriters, if the owners of the cargo had insured their interest. If this case, therefore, had been decided at Bremen, the defendants would have been there held liable to make good to Messrs. Bolte & Co. the whole of the said sum of 663*l.* 2*s.* 10*d.* The Court was to be at liberty to draw inferences of fact.

The policy was, as to the body of it, in the ordinary form of an English Lloyd's policy, with the ordinary enumerated risks. But in the margin there were written, among other provisions, the following:—"To pay general average as per foreign statement, if so made up." "Warranted free from particular average, unless the ship or craft be stranded, sunk, or burnt; but this warranty not to exonerate the underwriters from the liability to pay any special charges for mats, warehousing, forwarding, or otherwise, if incurred, as well as partial loss arising from transhipment." "Warranted free from capture and seizure, and the consequences of any attempt thereat."

Upon this case Mr. Watkin Williams, in an able argument, every part of which seemed to me to deserve and require the utmost attention, contended that the defendants, English underwriters of an English policy, were not liable in respect of the 663*l.* 2*s.* 10*d.* He maintained that the loss of Messrs. Bolte & Co. in respect of that sum was not a general average loss according to English law, or according to the law of Bremen; that it was not stated or made up as a general average loss in the Bremen average statement; and, even if it were a general average loss according to the law of Bremen, and were so stated in conformity with such law, or if it was so stated in fact, but erroneously according to Bremen law, and if in either case the defendants were bound by it as a foreign adjustment of a loss to be taken as a general average loss, yet that the defendants were not liable, because it was not a loss arising from any peril insured against by this English policy.

Now, in the first place, I agree that this was not a general average loss according to the law of England. There was a general average loss incurred during the voyage insured, by reason of the necessity arising from sea perils of the ship putting into two different ports of distress, and being necessarily repaired in order to enable the voyage to be completed for the benefit of all concerned: but all the contribution of the owners of cargo to that loss which can properly be called a general average contribution according to the English law was included in the first average-statement, dated the 3rd of August, 1868. It is true that the loss of the 663*l.* 2*s.* 10*d.* was necessarily incurred by Messrs. Bolte & Co. as owners of the cargo by reason of the cargo being bound by the bottomry bonds; and it is true that the loss was the result of sea perils, in the sense that without the happening of such perils the loss would not have been incurred: but this particular loss was not the immediate or the necessary result of any effort to avoid a peril of the sea. It was the immediate result of the insolvency of the ship-owner, or of the want of means or credit of the master, and of the deficiency in value on sale of the ship,—contingencies which might or might not have happened after the perils of the sea had happened, and without the happening of some one or more of which the particular loss would not have occurred, notwithstanding the occurrence of the perils of the sea.

Moreover, the payment of the 663*l.* 2*s.* 10*d.* was made after the completion of the voyage and the safe arrival of the ship and cargo, and was not made for the common advantage of ship, freight, and cargo, but upon consideration of a balance of advantage and loss to the owner of cargo alone. It was made in order to obtain possession of the cargo.

But, as to the second point, I think that, upon this special case as stated, the Court is bound to hold that the loss was a general average loss according to the law of Bremen. The allegations made at the beginning and end of par. 14 seem to me to amount to express findings on the point. I further think that, upon the allegations made in paragraphs 13 and 14, treated as they are in the fourth of the defendants' points (1), and it being admitted that the words "such a loss as that which has occurred," at the commencement of par. 14, refer to the sum of 663*l.* 2*s.* 10*d.*, we are bound to hold, either as upon an express finding or as upon an inference of fact to be drawn, that the loss of the 663*l.* 2*s.* 10*d.* was stated by the average-stater at Bremen as and with intent to be a general average loss falling on the owner of cargo.

The next point to be determined is, whether, under such circumstances, underwriters of an ordinary English policy would be liable. That raises the question as to how far underwriters of such a policy on an insured voyage to terminate at a foreign port are bound by a foreign general average adjustment made at that port of destination. Now, I think it is clearly established that, upon such a policy, English underwriters are bound by the foreign adjustment as an adjustment, if made according to the law of the country in which it was made. They are bound although the contributions are apportioned between the different interests in a manner different from the English mode, or though matters are brought into or omitted from general average which would not be so treated in England. I further incline to think, notwithstanding the case of *Power* v. *Whitmore* (2), that underwriters, if they are not absolutely bound to accept the foreign adjustment as rightly made, if bonâ

9 C. P. 4 [illegible]

---

(1) That the clause, "To pay general average as by foreign statement, if so made up," is not to be extended to make the underwriters liable for a loss by way of general average which is not a general average loss according to English law.

(2) 4 M. & S. 141.

1872

HARRIS v. SCARAMANGA.

fide made, must assume it to be rightly made, if bonâ fide made, until the contrary be proved. It seems to be stated as a general principle of insurance law that, "when a general average is fairly stated in a foreign port, and the assured is obliged to pay his proportion of it, he may recover the amount from the insurer, *though the average may have been settled differently from what it would have been at the home port*:" 2 Phillips on Insurance, § 1414, citing *Depan* v. *Ocean Insurance Co.* (1) And further on in § 1414 it is thus stated: "The lex loci is, that underwriters shall reimburse general averages, if within the perils insured against, *according to the apportionments made and contributions exacted abroad at the port of destination.*" But I think that, according to English and American law, the underwriter of a policy in the ordinary form is not liable to indemnify against any general average loss or contribution, whether it be general according to the law of his own country or according to the law of the foreign country in which the voyage terminates, or whether the adjustment be made according to his domestic or to the foreign law, if the general average loss be not incurred, or the general average contribution be not made, in order to avert loss by a peril insured against.

I do not find this doctrine so clearly expressed in the English books or cases as I should have expected. But the statements in Phillips on Insurance,—a book of the highest authority as to English as well as American insurance law,—are clear and precise. "Underwriters are liable to make indemnity by payment of either a particular or general average or total loss *only in case of its being caused by the perils insured against*:" 2 Phillips, § 1353. It is obvious that this must be so in case of a particular average loss or a total loss. And a general average loss, as meaning the loss to the person who suffers damage, is no more than a particular average loss to each of the parties who has to suffer or contribute in respect of it. By the word "general," it is only meant that the loss is to be generally distributed, or the contribution to be generally made by all. It is the loss to each and all caused by a sea peril, which must in this as in other cases be the loss caused by a peril insured against. "*So far as general average is occasioned by*

---

(1) 5 Cowen, 63.

1872

HARRIS v. SCARAMANGA.

perils insured against," says Phillips, "the insurers are liable for it in proportion to the amount insured:" § 1409. "General average is only payable, says Mr. Justice Story, where it is a consequence, or result, or incident of some peril insured against:" see *Sherwood* v. *General Mutual Insurance Co.* (1) quoted in 2 Phillips on Insurance, 3rd ed. p. 173, § 1414.

So far, then, except as to the true meaning of the special case itself, I have gone almost entirely with the arguments and propositions put forward by Mr. Williams; but it is the force and truth of them which now make me break from his next point.

If these propositions be true, and the conclusion in which he asks us to concur be correct, the proviso in the margin of the policy seems to me to be of no real effect. The same interpretation and effect would be practically given to a policy in the ordinary form, that is, to this policy without the marginal provision. This policy, being an English policy, is to be construed according to English rules of construction; and among those rules are two,—first, that the Court must, if possible, give some effect to words apparently used as words of obligation in a written instrument made between parties; and the other, that the words are rather to be construed so as to impose a burthen on the person who apparently assumes them as obligatory. Mr. Williams contended that effect would be given to the proviso by holding that it met the case, otherwise unmet, of an average statement erroneously made according to the law of the foreign port. But, in the first place, I have already expressed an opinion that such a statement, by virtue of which the assured would be just as much compelled to pay his appointed contribution as by a correct statement, is binding on the underwriters; and, if not, I cannot adopt the view that this important stipulation is introduced in contemplation only of a foreign average-stater not knowing how to conduct his own business according to the law of his own country.

It is well known, says Mr. Phillips, in the paragraph I have so often quoted, viz. § 1414, amongst underwriters and merchants that there is a diversity in the effect of foreign adjustments. Three such recognized diversities are then pointed out. The third is thus stated:—"When a loss is included in a general average in one country, which is not insured against in the policies of another, the underwriters in the latter certainly ought not to be liable to indemnify the assured against the proportion of a foreign adjustment of such a loss." This is, of course, averred with respect to policies in the ordinary forms.

---

(1) 1 Blatchford's Rep. 251.

It seems to me that the only way to give effect to the marginal provision in this case, and an effect as against the underwriter who has by it taken upon himself some real substantial obligation different from his ordinary obligation, is, to say that it was intended to meet this recognized diversity, and to oblige the underwriter to indemnify the assured against a loss which should fall upon him by compulsion in the port of Bremen, and which should be there treated as against him as a general average loss or contribution, unless such loss so treated should be a consequence of an attempt at capture or seizure. Upon such a construction of the policy, the defendants are under the circumstances liable to the plaintiffs in respect of the disputed sum of 663*l.* 2*s.* 10*d.*

This decision makes it unnecessary to determine whether the present case is within the principle of the decision in *Dent* v. *Smith* (1), or what is the legal principle upon which that case was decided. I cannot, however, help expressing the greatest doubt whether the present case can be brought within the principle on which I understand the decision in that case to have been founded, viz. that there was in that case *before the completion of the voyage insured* a total loss by shipwreck, and a detention of the cargo in the hands of a foreign government, and a detention by the foreign government to the end, so that a total loss could only be overcome by a payment exacted by such foreign government.

I am of opinion that judgment should be entered for the plaintiff for 663*l.* 2*s.* 10*d.*

Judgment for the plaintiffs.

Attorneys for plaintiffs: *M'Leod & Watney.*
Attorney for defendants: *James H. Cotterill.*

---

(1) Law Rep. 4 Q. B. 414.

CORY AND OTHERS, APPELLANTS; THE CHURCHWARDENS, &c., OF GREENWICH, RESPONDENTS.

1872
June 7.

Poor-rate—Occupation—Moorings, Liability of—Easement.

The appellants were possessed of a derrick for loading and unloading (but not storing) coals in the river Thames, which was moored within the parish of Greenwich under a licence from the conservators, in the following manner, viz. by two single-fluked anchors on the side nearest the shore, and by two stones on the channel side, and by two stream-anchors one at the head and the other at the stern. The anchors and stones (which could be hauled on board by the machinery on the derrick) were merely dropped into the river, no force being used for the purpose of fastening them, but only a small quantity of ballast being removed in the bed of the river to enable the stones to lie flat. The derrick was always afloat, and was subject to be moved to any other part of the river, at the pleasure of the conservators:—

Held, that the appellants were not liable to be rated to the relief of the poor in respect of these "moorings."

10 C.P. 5
570–2
1 C.P.D. 5
2 App Ca
271, 28
2 QBD

CASE stated by a police magistrate, under 20 & 21 Vict. c. 43.

1. The appellants were summoned before the magistrate sitting at the Greenwich police court for having neglected or refused to pay a poor-rate assessed upon them under certain local Acts relating to Greenwich, viz. 4 Geo. 4, c. lxx, and 9 Geo. 4, c. xliii, in respect of "a house, building, land, tenement, or hereditament," occupied by them in the parish, and described in the rate as "moorings to which coal derrick or apparatus Atlas No. 1 are moored to bed of river Thames."

2. The coal derrick is similar to a large coal barge, and is about 250 feet long and 90 feet wide. It is fitted up with the necessary machinery for unloading coal from colliers, and reloading into vessels and barges brought alongside. No coals are deposited or stored in the derrick.

3. The derrick is the property of the appellants, and rides afloat on the river Thames within the boundary of the parish of Greenwich. It has been anchored at the same place for some years, but daily changes its position slightly with the ebb and flow of the tide.

4. The derrick is retained at the spot where she floats in the following way, i.e. by two single-fluke anchors on the side nearest the shore, and by two stones on the channel side, and by two

stream-anchors, one at the head and the other at the stern. The anchors and stones were merely dropped into the river, no force being used for the purpose of fastening either anchors or stones. Before dropping the stones, a small quantity of ballast was removed in the bed of the river, so that the stones might lie flat and securely. These stones serve only the purpose of anchors, and are used in this as well as many other instances on the channel side only for the avoidance of accidents, there being danger of vessels when passing amid channel at low water damaging themselves against anchors if anchors were used.

5. These anchors and stones can be hauled on board by the machinery thereon, and the derrick moved to any other part of the river; and she was in fact formerly stationed at another part, and was moved from thence to her present position, bringing with her her anchors and stones, which were dropped down as stated above.

6. The soil and bed of the river Thames is by the Thames Conservancy Acts vested in the conservators of the river; and they have the management of the river.

7. The derrick is stationed at the place where she now rides, under the following resolution passed by the conservators on the 6th of December, 1861:—

> "Resolved, That permission be given to Messrs. Cory & Son to lay down moorings (at which they may place the derrick hulk) immediately opposite the sluice next eastwards of Angerstein's Wharf, East Greenwich, and 510 feet from the river wall at the said sluice, as per plan; the work to be done to the satisfaction of the conservators of the river Thames and under the inspection of the harbour-master, and to remain on the following conditions being agreed to and observed by Messrs. Cory, viz. that the accommodation be assessed and the rent paid thereon; that the hulk be not used for the purpose of storing coals; that it be for the general use of the coal-trade, but the barges to or from the hulk be in all cases towed by a steam-tug to or from the Custom House, London; that all vessels leave the hulk immediately after being discharged; and that sailing colliers when discharged be towed away to such part of the river as the harbour-master may direct; and in all other respects to be worked to the satisfaction of the conservators under the inspection of the harbour-master; and with the full understanding on the part of Messrs. Cory that if, at any time hereafter, it shall be found by the conservators inexpedient to permit the moorings for the derrick hulk to remain in that or any other part of the river, the conservators will, under, the powers vested in them by the 91st section of the Thames Conservancy Act (1) cause the same to be removed."

---

(1) 20 & 21 Vict. c. cxlvii.

8. The rent paid by the appellants to the conservators under that resolution has been assessed and now stands at 600*l.* per annum.

9. Reference was made upon the hearing of the summons to *Watkins* v. *Milton-next-Gravesend* (1); and the magistrate found as a fact that the appellants were occupiers of the soil in the bed of the river on which the moorings were placed, and therefore decided against the appellants, and that they were liable to be rated.

10. It was agreed that neither party should raise any technical difficulties or objections, and that the case should be decided upon the merits; the Court to be at liberty to draw any inferences of fact if it should think fit.

The question for the opinion of the Court was, whether the appellants were liable to be rated to the relief of the poor of the parish of Greenwich in respect of their occupation of "moorings" under the circumstances stated.

Patchett, for the appellants. To render a person liable to be rated in respect of a house, building, land, tenement, or hereditament, there must be such an occupation as would entitle him to maintain trespass, if disturbed in it. The cases of *Watkins* v. *Milton-next-Gravesend* (1), and *Grant* v. *Oxford Local Board of Health* (2), are decisive to shew that there is no such occupation here. In the former, a floating coal-depôt fastened, by the licence of the conservators of the Thames, to moorings belonging to the conservators, consisting of two large fan-shaped screws which were screwed into the soil or bed of the river to a depth of about eight feet, was held not liable to be rated. In the latter, the University Boat Club were held not to be rateable in respect of a barge which was moored by means of chains and iron rings attached to two posts fixed to the soil of the bed of the Isis, of which the corporation of Oxford were the owners; and Hayes, J., said (3): "I think the cases have gone quite far enough in deciding that things which are substantially chattels are rateable as real property. This boat is a chattel, and it would certainly be a strong thing to say that it could be rated as real property, such as a tenement or a hereditament, unless there is a clear case of occupation,—an occupation of something which is firmly and permanently fixed or attached to the soil itself." In the present case there is no occupation of that sort; but a mere permission or licence from the conservators to Messrs. Cory to moor their derrick in a part of the river from which they may be at any time ordered by the harbour-master to remove it,—the moorings not being "moorings" properly so called, but merely anchors or something in lieu of anchors dropped from the derrick itself. In all cases where persons have been held to be rateable in respect of floating-piers, it has been because they are by some means fixed permanently to the soil.

---

(1) Law Rep. 3 Q. B. 350.

(2) Law Rep. 4 Q. B. 9.

(3) Law Rep. 4 Q. B. at p. 14.

Barrow, for the respondents. In *Watkins* v. *Milton-next-Gravesend* (1), the moorings were placed in the bed of the river by the conservators; here, they are the property of Messrs. Cory, and were put down by them, and put down in such a manner as to fix them permanently in the soil; and the magistrate has found as a fact that the appellants are occupiers of the soil.

[KEATING, J. What is the nature of their tenure? and what portion of the soil do they occupy?]

They are at least tenants at will, or by sufferance. It would be enough even if they were wrongdoers. And they occupy so much of the soil as is necessary to hold the anchors and stones. In *Forrest* v. *Greenwich* (2), the appellant moored a barge in the Thames between high and low water mark; the moorings were stationary in the bed of the river, and the barge floated at high water, and grounded at low water on the posts or blocks in the bed of the river by which it was moored, and which were in the parish of Greenwich; the barge was connected by a chain with stairs on the land, the soil of which was not the property of or in the occupation of the appellant, and which at that point was a common highway to the Thames; moveable planks were laid from the shore to the barge, and thence to another barge moored further out in the Thames, and which always floated; and it was held that the appellant was rateable in respect of "land occupied by the stages, platforms, barges, and other matters and things used as a pier for landing and embarking steam-boat pas-

(1) Law Rep. 3 Q. B. 350.

(2) 8 E. & B. 890; 27 L. J. (M.C.) 96.

sengers." Lord Campbell, in delivering judgment, says (1): "The appellants are the occupiers of land by the use which they make of the blocks, of the stairs for holding the staples, and of the iron anchors permanently placed in the bed of the river." The blocks and anchors there differ in no respect from the anchors and stones here.

Patchett was heard in reply.

WILLES, J. I am of opinion that the decision of the magistrate ought to be reversed. He has found as a fact that the appellants are occupiers of the soil in the bed of the river; not that they are liable to be rated in respect of the anchors or stones fixed in the bed or soil of the river as were the fan-shaped screws in *Watkins* v. *Milton-next-Gravesend* (2), under Mitchell's patent, which are so extensively used in every part of the world as a substitute for masonry or bricks and mortar in the erection of lighthouses, piers, and other buildings. He finds that the things in respect of which the appellants are rated are "moorings,"—not moorings in the sense of being chains attached to something fixed in the bed of the river, with a buoy and ring for vessels to fasten to whenever they think proper. He describes them thus:—The derrick is retained at the spot where she floats by two single-fluke anchors on the side nearest the shore and by two stones on the channel side, and by two stream-anchors one at the head and the other at the stern. The anchors and stones were merely dropped into the river, no force being used for the purpose of fastening them. The stones were used in the place of anchors on the channel side merely to avoid injury to vessels passing. The anchors and stones can be hauled on board the derrick by her own machinery, and she may be moved to any other part of the river. All that that statement amounts to is, that the derrick is anchored at the spot where she floats. It is not like an immoveable thing that is susceptible of occupation; the derrick is fastened to things which are accessories to herself, and which are moveable things, whether silted over or not, and which constitute no more an occupation of any portion of the bed of the river than would the anchor of any other vessel. It is true that this derrick has been anchored at the same place for some

(1) 8 E. & B. at p. 899.

(2) Law Rep. 3 Q. B. 350.

1872

Coby v. Church-wardens of Greenwich.

years. But, when does the thing granted cease to be an easement? The appellants are not occupiers in the sense that any one interfering with their possession would be liable to them as for a trespass to the soil. The only thing in respect of which a trespass as against them could be committed would be the chattel. The case of *Forrest* v. *Greenwich* (1) is quite distinguishable. The appellant was there held to be rateable in respect of the landing-stage, &c., because it was a fixed thing. This derrick, on the contrary, is a moveable thing, and may at any time be removed to another spot by the conservators; the right of removal being expressly reserved by the licence or permission to moor it where it now is. Moreover, the derrick here is always afloat; whereas in that case one of the barges which constituted the landing-stage floated at high-water, but at low-water it grounded on the blocks which were fixed to the bed of the river. That might well have made the appellant an occupier of land in the bed of the river. I have already observed upon *Watkins* v. *Milton-next-Gravesend.* (2) There, too, the moorings were immoveably fixed to the bed of the river, and not, as here, part of the equipment of the vessel herself.

Keating, J. I am entirely of the same opinion, and for the same reasons. The statements in the case amount to nothing more than that this derrick is a vessel anchored to the bed of the river. I think we could not hold the appellants to be rateable in respect of these moorings without overturning the case of *Watkins* v. *Milton-next-Gravesend.* (2)

Willes, J. This is a question of right, and ought to be treated like a civil action. The costs must therefore follow.

Decision reversed, with costs.

Attorney for appellants: *Mark Shephard.*
Attorney for respondents: *W. Bristow.*

(1) 8 E. & B. 890; 27 L. J. (M.C.) 96.

(2) Law Rep. 3 Q. B. 350.

VARLEY *v.* COPPARD.

Lease—Covenant against Assignment—Partners.

1872
May 30.

1 Ch D.
5 Ch D. 2
12 Ch D 46

A. and B., partners in trade, were assignees of a lease which contained a covenant by the lessee, for himself and his assigns, that he would not, neither should his executors, administrators, or assigns, assign the demised premises without the consent in writing of the lessor. On the dissolution of the partnership, A. assigned all his interest in the premises to B.:—

Held, a breach of the covenant.

THE declaration alleged that the plaintiff, by deed bearing date the 29th of February, 1868, let to J. C. Watson a messuage, to hold from the 29th of February, 1868, for the term of six years, to be computed from the 25th of December, 1867, less and except the last three days of the same term; that Watson by the deed, for himself and his assigns, covenanted with the plaintiff that during the term the lessee should not, neither should his executors, administrators, or assigns, at any time or times assign the demised premises without the consent in writing of the plaintiff, his executors, &c., first obtained prior to such assignment; that afterwards, during the term, Watson, with the consent in writing of the plaintiff first obtained, assigned all his estate in the messuage to the defendant and D'Aeth, and the same thereby became vested in them; that afterwards during the term the defendant assigned all his estate and interest in the messuage to D'Aeth without the consent in writing of the plaintiff first obtained prior to such assignment; and that, by reason of the premises, the plaintiff had lost and would be deprived of the rent payable in respect of the premises, and had been deprived of the benefit of the covenant of the lease against the defendant, &c.

Demurrer, on the ground that the assignment to D'Aeth was not a breach of covenant. Joinder.

Gibbons, in support of the demurrer. No doubt this is a covenant running with the land: *Williams* v. *Earle.* (1) But such a covenant, like a covenant which involves a penalty, is to

---

(1) Law Rep. 3 Q. B. 739.

1872

VARLEY v. COPPARD.

be construed strictly: *West* v. *Dobb.* (1) The question is whether an assignment by one of two joint lessees to the other is a breach of the covenant not to assign "the demised premises." In *Crusoe* d. *Blencowe* v. *Bugby* (2), a lessee for twenty-one years, with a covenant not to demise, assign, transfer or set over, or otherwise do or put away the indenture or the premises thereby demised, or any part thereof, without consent demised the premises for fourteen years; and it was held that this was not a breach of the covenant. The Court, after time taken to consider, said: "The Courts of Westminster have always looked nearly into these conditions, covenants, or provisoes; that the devising a term was *a doing or putting it away*, that a lessee becoming a bankrupt *was a putting or doing it away*, that a dying intestate *was a putting it away;* so, being in debt, by confessing a judgment and having the term taken in execution, *was the like:* but none of these amounted to an assignment or to a breach of the covenant or condition." Here, the assignees of the term were partners in trade: and it must have been contemplated that there would at some time be a dissolution of the partnership. A feme sole lessee would not by her marriage incur a forfeiture under such a covenant as this. In *Roe* d. *Dingley* v. *Sales* (3), taking a partner was held to be a breach of a covenant not to assign without licence; but that was on the ground that the lessee had granted the exclusive possession of part of the premises. In Platt on Covenants, 406, it is said: "Covenants of this description have always been construed by Courts of law with the utmost jealousy, to prevent the restraint from going beyond the express stipulation."

H. Tindal Atkinson, contrà. An assignment by one joint tenant to the other is clearly a breach of the covenant, for each is possessed of the whole. In Woodfall's Landlord and Tenant, 10th ed. 551, it is said: "A covenant not to assign without licence is broken upon the execution by the lessee (without licence) of any deed whereby he parts with the demised premises for the whole of the residue of his term." The defendant has done that here; he has parted with the whole of his interest in the term. And see *Paul* v. *Nurse.* (1)

---

(1) Law Rep. 4 Q. B. 634; in Ex. Ch. Law Rep. 5 Q. B. 460.

(2) 3 Wils. 234.

(3) 1 M. & S. 297.

Gibbons added nothing in reply.

WILLES, J. I am of opinion that the plaintiff is entitled to judgment. The action is brought for a breach of a covenant in a lease whereby the plaintiff demised a messuage to one Watson, with a covenant by Watson, for himself and his assigns, that during the term the lessee should not, neither should his executors, administrators, or assigns, assign the demised premises without the consent in writing of the plaintiff, his executors, &c., first obtained prior to such assignment. Watson, with the consent of the plaintiff, assigned the term to the defendant and one D'Aeth. Notwithstanding this consent, the covenant not to assign still remained in force, and the defendant and D'Aeth stood in the same position as if they and each of them were in under a lease which restricted them from assigning. The action is brought against one of the assignees for having assigned his interest in the premises to the other of them without the consent of the lessor. Is that a breach of the covenant? I think it is. The covenant, though it relates to the estate of the two, necessarily involves the interest of each: it means that neither of them shall assign the whole or any part of his interest without consent; otherwise, a tenant might assign all but a sixty-fourth part. Assuming such "putting away" as is alluded to in the case in 3 Wilson (2), which is differently reported as to this point in 2 W. Bl. 766, not to be an assignment within the covenant (for which, however, no authority is cited), I cannot think that the assignment of the sixty-three parts would be anything but a breach of the covenant. The argument, in effect, amounts to this, that, if the two assigned, one his undivided moiety to A., and the other his undivided moiety to B., there would be a breach of the covenant; but that, if each assigned his undivided moiety to B., there would be no breach. That, as it seems to me, would be frittering away the covenant, and making it worthless. It is unnecessary to consider whether the merely taking a partner would be a breach of the covenant.

(1) 8 B. & C. 486.

(2) *Crusoe* d. *Blencowe* v. *Bugby*, 3 Wils. 234.

1872

VARLEY
v.
COPPARD.

But I think an assignment by one partner of his undivided moiety to the other clearly is a breach of the covenant. The plaintiff must have judgment.

KEATING, J. I am entirely of the same opinion.

Judgment for the plaintiff.

Attorneys for plaintiff: *Sharp & Turner.*
Attorneys for defendant: *Weeks & Son.*

May 31.

M'CARTHY *v.* THE METROPOLITAN BOARD OF WORKS.

Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 68—*Compensation for Lands injuriously affected—Thames Embankment Act*, 1862 (25 & 26 *Vict.*) *c. xciii.*

CP 403
7 HL 245

The plaintiff was the occupier, under a lease for a long term, of a house and premises in the city of London, where he carried on the business of a carman and contractor, and which premises were adjacent to a public draw-dock leading to the river Thames. The plaintiff had no right or easement to or in the dock other than his right as one of the public; but, by reason of their proximity to the dock, and the access given thereby to and from the river, his premises were rendered more valuable either to sell or to occupy, with reference to the uses to which any owner might put them.

The Metropolitan Board of Works, in constructing the Thames (northern) Embankment under the powers conferred upon them by the 25 & 26 Vict. c. xciii, filled up the dock, and so cut off the access from the river to the public street adjoining the plaintiff's premises, which thereby became, as premises either to sell or occupy in their then state, and with reference to the uses to which any owner or occupier might put them, permanently damaged and diminished in value:—

Held, that the plaintiff's interest in his premises was injuriously affected within the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, s. 68, so as to entitle him to compensation.

Ricket v. *Metropolitan Ry. Co.* (Law Rep. 2 H. L. 175), distinguished.

Beckett v. *Midland Ry. Co.* (Law Rep. 3 C. P. 82), sustained.

Affd in Ex Ch LR 8 CP 191 and H of L LR 7 HL 243

THIS was an action brought by the plaintiff against the defendants to recover the sum of 1900*l.*, being the amount (less 430*l.*, the claim to which had been given up by the plaintiff,) assessed by a jury summoned in accordance with the provisions of the Lands Clauses Consolidation Act (1845, 8 & 9 Vict. c. 18) as compensation for the alleged injurious affecting of the plaintiff's estate and interest in a house and premises in manner and under the circumstances stated in the following case stated for the opinion of the Court, under a judge's order:—

1. The plaintiff, at the time of the stopping up of the Whitefriars Dock, hereinafter mentioned, resided and carried on business as a carman and contractor for supplying builders with lime, bricks, and other materials, and as a large dealer in sand and ballast, at the premises in the next paragraph described, which he held under a lease for eighty years from Michaelmas, 1854.

2. The premises consisted of a house with warehouse, stables, and business premises, and were situate in Whitefriars, in the city of London, and a draw-dock known under the name of the Whitefriars Dock, leading into the river Thames, which was very largely used by the plaintiff in the way of his business.

3. The draw-dock was a free and open public dock, but was principally used by the plaintiff, the City Gas Company, the commissioners of sewers for the city of London, and the other persons whose respective premises were in proximity to it.

4. The plaintiff had no right or easement in or to the said draw-dock other than his right as one of the public; nor was there appurtenant or otherwise belonging to the plaintiff's said premises any easement, right, or privilege in or to the dock.

5. The dock, at the time of its being stopped as hereinafter mentioned, was of the length of 352 feet, of the width of 46 feet at the outlet upon the river Thames, and of 30 feet at its head. It originally, and before the plaintiff became possessed of his premises, extended to Tudor Street; but about twenty years ago it was shortened to its present length by the commissioners of sewers for the city of London, who filled in the end and converted it into a roadway and paved the space so obtained, and have down to the present time kept the roadway in repair. Prior to such filling in, the roadway between the plaintiff's premises and the edge of the dock was about twenty feet wide.

7. By reason of the proximity of the dock to the plaintiff's premises, and the access given by the dock to and from the river Thames, the premises were rendered more valuable as premises

either to sell or to occupy, with reference to the uses to which any owner might put them.

8. In the execution of the works authorized by the Thames Embankment Act, 1862 (25 & 26 Vict. c. xciii), and the Thames Embankment (North and South) Act, 1868 (31 & 32 Vict. c. cxi), in the month of October, 1868, a solid embankment was carried along the foreshore of the Thames, as shewn in the plan, and thus permanently stopped up and destroyed the Whitefriars Dock.

9. By reason of the stopping up and destruction of the dock as aforesaid, and the destruction thereby of the access to and from the river Thames, the plaintiff's premises became and were, as premises either to sell or occupy, in their then state and condition, and with reference to the uses to which any owner or occupier might put them in their then state and condition, permanently damaged and diminished in value; and the plaintiff alleged that consequently he became entitled to compensation.

10. The defendants denied that he was so entitled, and issued their warrant to the sheriffs to summon a jury, without prejudice to their right to dispute the question; and the jury assessed the amount of injury and damage at 1900*l.*

The question for the opinion of the Court was, whether under the circumstances set forth in the case the plaintiff's interest in his premises was injuriously affected within the Lands Clauses Consolidation Act, 1845, so as to entitle him to compensation.

If the Court should be of opinion in the affirmative, judgment was to be entered for the plaintiff for 1900*l.*, with costs of suit from the 27th of April, 1871. If the Court should be of opinion in the negative, then judgment of nol. pros. was to be entered for the defendants, with costs of defence from the last-mentioned date.

Prentice, Q.C. (*Thesiger* with him), for the plaintiff. The plaintiff is, upon the authority of *Beckett* v. *Midland Ry. Co.* (1), clearly entitled to compensation under s. 68 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), in respect of the diminished value of his premises in consequence of the construction of the

(1) Law Rep. 3 C. P. 82.

Thames Embankment. *Chamberlain* v. *West End of London &c. Ry. Co.* (1) is also expressly in point. The seventh and ninth paragraphs of the case were framed with direct reference to the decision in *Beckett* v. *Midland Ry. Co.* (2). Reliance will be placed, on the part of the defendants, upon *Reg.* v. *Metropolitan Board of Works* (3): but there no injury to the premises themselves, no diminution of their market value, was proved. That brings it within the principle laid down by the House of Lords in *Ricket* v. *Metropolitan Ry. Co.* (4), and takes it out of *Beckett* v. *Midland Ry. Co.* (2). In that case, as here, the plaintiff had only a right to use the way as one of the public; but it was a right which added to the market value of his premises. Here, the plaintiff's access to the river from his premises is destroyed for ever. That is a thing which, if it had not been done under the sanction of an Act of Parliament, would have given him a clear right of action: therefore it entitles him to claim compensation under s. 68 of the Lands Clauses Consolidation Act, 1845.

[Keating, J. The right of action is not the test of the right to compensation under the statute.]

So it is said in *Caledonian Ry. Co.* v. *Ogilvy.* (5) But the owner's interest in the premises must certainly be injuriously affected if their saleable value in the market is diminished.

Hawkins, Q.C. (*Philbrick* with him), for the defendants. In no case has it been held that the mere fact of premises being lessened in value by reason of the execution of public works gives the owner a right to claim compensation under the Lands Clauses Consolidation Act, 1845, unless there has been some interference with the property itself or with some peculiar private right annexed and belonging to it.

[Willes, J. No particular or private right was invaded in that sense by the lessening of the roadway in *Beckett's Case.* (2)]

The access of the plaintiff to and from the public street was not interfered with in this case. It is true, he had a right to use the draw-dock for the purpose of getting to and from the river; but that was a right which he enjoyed in common with the rest of the public. The convenience to the plaintiff, it is true, was greater than to some others who had the same right: but the character of his right differed in no respect from that of any other of the Queen's subjects. His remedy, if any, is by indictment: *Wood* v. *Stourbridge Ry. Co.* (1)

---

(1) 2 B. & S. 605, 617; 31 L. J. (Q.B.) 201; 32 L. J. (Q.B.) 173.

(2) Law Rep. 3 C. P. 82.

(3) Law Rep. 4 Q. B. 358.

(4) Law Rep. 2 H. L. 175.

(5) 2 Macq. 229.

(115 C 8 Jur N.S. 935 9 L.T. 1051

[KEATING, J. *Chamberlain* v. *West End of London Ry. Co.* (2) and *Beckett* v. *Midland Ry. Co.* (3) are substantially the same.]

In each of those cases the house was directly and immediately affected; the access to it was obstructed. That, however, is not this case: the plaintiff has the same access to and from the public roadway as he had before: what he complains of is that he has lost the use of the dock,—a right which, as is expressly found in the case, he enjoyed no otherwise than as one of the public. It is true that it was more convenient to the plaintiff and to the other persons mentioned in par. 3, whose premises were in close proximity to it, than to others having business premises at a greater distance. But that is only a question of degree. It would be extremely difficult to define the distance which would preclude a claim for compensation, if this plaintiff be entitled to it. In *Reg.* v. *Metropolitan Board of Works* (4), where the occupier of premises near the Thames had been used to draw water from the river, and to bring barges to a draw-dock, as public rights, and not as rights attached to the premises, and was obstructed in the enjoyment of these rights by the works of the embankment, it was held that he was not entitled to compensation. Mellor, J., there says (5): "A man may live in a particular house, and many cases can be suggested in which he may suffer a considerable injury, but unless the injury is to *the house, or to some interest in the house*, such as a right of way, or rights similar to those referred to in the judgment of Lord Cranworth (6), it is clear that, according to the opinion of that noble and learned lord, there could be no compensation, because there would have been before the statute no action in respect of any injury to the land on which the house stands. . . . Lord Chelmsford says (7): 'I think that the criterion of a party's

---

(1) 16 C. B. (N.S.) 222.

(2) 2 B. & S. 605, 617; 31 L. J. (Q.B.) 201; 32 L. J. (Q.B.) 173.

(3) Law Rep. 3 C. P. 82.

(4) Law Rep. 4 Q. B. 358.

(5) At pp. 362, 3.

(6) In *Ricket's Case*, 2 H. L., at p. 198.

(7) Law Rep. 2 H. L. at p. 187.

(2) S C 8 Jur. N S. 935. 9th [illegible]

1872

M'CARTHY *v.* METROPOLITAN BOARD OF WORKS.

right to damages under the clauses of the Railway and Companies Acts, upon which this case depends, is correctly stated by Lord Campbell in *Re Penny and South Eastern Ry. Co.* (1), and that, in his words, unless the particular injury would have been actionable before the company had acquired their statutory powers, it is not an injury for which compensation can be claimed. At the same time, the observation of my noble and learned friend Lord Cranworth in the case of *Caledonian Ry. Co.* v. *Ogilvy* (2) must not be lost sight of, that it does not follow that a party would have a right to compensation in some cases in which, if the Act of Parliament had not passed, there might have been not only an indictment but a right of action,'—clearly shewing that, when we use the words 'actionable right,' it must mean an actionable right in respect of some injury to land; it must not be an actionable right independently of occupation of land, but connected with land. That is the opinion, therefore, of Lord Chelmsford. Lord Cranworth says (3): 'Both principle and authority seem to me to shew that no case comes within the purview of the statute, unless where some damage has been occasioned to the land itself, in respect of which, but for the statute, the complaining party might have maintained an action. The injury must be actual injury to the land itself, as, by loosening the foundation of buildings on it, obstructing its light or its drains, making it inaccessible, by lowering or raising the ground immediately in front of it, or by some such physical deterioration.'"

Kipp Cas 2

[WILLES, J. I agree with everything there said; but it is wholly inapplicable to the present case. The injury there complained of was an obstruction to the plaintiff's trade of a potter. There was no such finding as there is here, that the premises of the claimant were diminished in value.]

There is no injury to any individual right of the plaintiff separable from that of any other subject. It is *Wilkes* v. *Hungerford Market Co.* (4) over again,—a case which is overruled by the decision in the House of Lords.

---

(1) 7 E. & B. 660; 26 L. J. (Q.B.) 225. 3 Jur N.S. 450

(2) 2 Macq. at p. 235.

(3) Law Rep. 2 H. L. at p. 198.

(4) 2 Bing. (N.C.) 281.

1872

M'CARTHY *v.* METROPOLITAN BOARD OF WORKS.

Thesiger, in reply. The judgment in *Reg.* v. *Metropolitan Board of Works* (1) proceeds entirely on the ground that the injury complained of was purely personal. There was no statement or finding that the house was diminished in value. That obviously distinguishes it from the present case.

WILLES, J. It appears to me that this case comes within the principle of *Beckett* v. *Midland Ry. Co.* (2) By that decision we are bound, and we must act upon it until authoritatively told that we are wrong. It appears to me to have been a correct decision, and not to be at variance with any of the cases which have been referred to. Certainly it is not at variance with *Ricket* v. *Metropolitan Railway Co.* (3), where there was only a temporary loss of trade to the tenant, and no diminution in the value of the house itself. That is explained in *Beckett* v. *Midland Ry. Co.* (2), and constitutes the distinction between that case and *Caledonian Ry. Co.* v. *Ogilvy.* (4) In the last-mentioned case, Lord St. Leonards says (5): "I can see nothing by which this gentleman would sustain damage beyond what everybody else sustains. His estate is not damaged." I recollect being much struck with that remark, when considering *Beckett's Case* (2); and in one of the judgments (6) I find the following observations upon it: "It must be admitted that there is great force in the remarks of one of the noble lords in *Ogilvy's Case* (5) as applied to a case in which there is no absolute diminution in the value of the property,—in which it cannot be affirmed that the property will sell for less in the market by a given sum, or that it will attract fewer tenants or let for a less rent. Those remarks appear to me to have no application to a case where the estate itself is diminished in value; for, when you talk of damage to an estate, you equally damage it whether you cut off an angle of it which may be the least desirable to a purchaser, or take away from it a substantial advantage in respect of which it will fetch less in the market than it would have done with that advantage." That distinction certainly exists between this case and *Ricket's Case* (1), and *Ogilvy's Case* (2), and *Batstone's Case* (3), which at first sight seems something like it. There, the occupier of premises near the Thames had been used to draw water from the river, and to bring barges to a draw-dock, as public rights, and not as rights attached to the premises, and was obstructed in the enjoyment of these rights by the works of the embankment: and it was held that he could not claim compensation under s. 68. But there was no finding there that the claimant's premises were diminished in value. They might have been sold or let to some one who did not require the conveniences which the claimant as a member of the public had enjoyed. When, however, you have a case in which the land is damaged to the extent of being worth less to any person or for any use to which it could be applied, whether to let or to sell, by reason of a permanent obstruction which will affect its value to all time, a very different consideration arises. There is a distinct finding to that effect in the 7th and 9th paragraphs of this case. The plaintiff's premises are in *immediate* proximity to the dock, separated from it only by a narrow road, the dock being his only means of communication with the Thames; and that communication has been cut off, and the premises thereby permanently diminished in value. The expression used in the case is "in their then state and condition." This brings me to consider the facts found in *Beckett's Case.* (4) There, the plaintiff was possessed of a house fronting on a public highway; and the defendants, under the authority of their Act, by an embankment on the outside narrowed the roadway about one half, and thereby materially diminished the market value of the plaintiff's house. It was suggested there that peradventure the premises might at some period be so used as that the narrowing of the road would cause no injury. But the Court held that the diminution in the market value gave the plaintiff a title to compensation; and that the property was to be taken in statu quo, and to be considered with reference to the use to which any owner might put it in its then condition, that is, as a house. The diminution in the width of the road there was held to be a permanent injury to the plaintiff's house, inasmuch as it lessened its market value. Here, the case finds that the only road by which the plaintiff had access from his premises to the Thames was permanently stopped up, and their market value in consequence diminished to the extent of 1900*l.* That brings the case within the very terms of *Beckett's Case.* (1) Mr. Hawkins says that the part of the public way which was obstructed here was not in immediate proximity to the plaintiff's premises. The same circumstance occurs in *Beckett's Case* (1): the part of the road incroached on by the defendants was the outer half. The statement in the case must be read in the sense that the proximity of the dock to the plaintiff's premises was of so material an advantage to them as to make them of greater value in the market than they would have been without that advantage. I entirely agree to what is said in *Reg.* v. *Metropolitan Board of Works* (2), that, in order to entitle a claimant to compensation under s. 68, there must be injury to land or to some interest in land, as distinguished from a mere personal injury. An injury to trade will not do; an interference with the personal convenience of the owner will not do. But there cannot be an injury to land unconnected with the convenience of the person who owns the land. Its desirableness to the individual constitutes part of its value. In the present case, however, it is found that the premises are diminished in value "with reference to the uses to which any owner or occupier might put them." Is damage to land by rendering it less accessible an injury? That was acknowledged by Lord Cranworth in *Ogilvy's Case* (3), and admitted in argument here to-day. In one of the reports of *Beckett's Case* (4) I observe my Brother Keating is represented to have said, "I look upon the 68th section of the Lands Clauses Consolidation Act as procedure only." That clearly is not so: and I do not think the learned judge could have said so. Any damage which is a permanent injury to the land is the foundation of a claim for compensation under that section. It is not necessary to go through the cases for the purpose of shewing that, where the direct consequence of the act done is that the premises are rendered less valuable in the market, the owner is entitled to compensation. Notwithstanding the striking difference of opinions which have been expressed upon this subject, I cannot entertain the slightest doubt that what was done here was an injurious affecting of the plaintiff's property which would have given him a cause of action before the statute, and which entitles him to claim compensation under s. 68. Looking to the recent case of the *Duke of Buccleuch* v. *Metropolitan Board of Works* (1), which has not been referred to, where the Duke claimed, and was undoubtedly entitled to recover, large compensation for the loss of his river frontage, and means of communication with the river, by the embankment, I cannot divest my mind of the absurdity that would follow from holding that the Duke was entitled to recover and the present plaintiff not entitled. I cannot conceive that it can make any difference whether the thing cut off is an easement enjoyed by the owner of the land, or any other collateral advantage the loss of which diminishes the market value of his premises. I think the plaintiff is entitled to our judgment.

---

(1) Law Rep. 4 Q. B. 358.

(2) Law Rep. 3 C. P. 82.

(3) Law Rep. 2 H. L. 175.

(4) 2 Macq. 229.

(5) 2 Macq. at p. 250.

(6) Law Rep. 3 C. P. 95.

---

(1) Law Rep. 2 H. L. 175.

(2) 2 Macq. 229.

(3) *Reg.* v. *Metropolitan Board of Works*, Law Rep. 4 Q. B. 358.

(4) Law Rep. 3 C. P. 82.

---

(1) Law Rep. 3 C. P. 82.

(2) Law Rep. 4 Q. B. 358.

(3) 2 Macq. at p. 237.

(4) Law Rep. 3 C. P. at p. 88.

Keating, J. I am entirely of the same opinion. I think that this case is governed by *Beckett* v. *Midland Ry. Co.* (2); and I am not aware of any case which at all interferes with that decision. The distinction between that case and *Caledonian Ry. Co.* v. *Ogilvy* (3), which first gave rise to the doubts that have been entertained upon this subject, has already been pointed out by my Brother Willes. *Ricket* v. *Metropolitan Ry. Co.* (4) is also clearly distinguishable from *Beckett* v. *Midland Ry. Co.* (2) There the injury complained of,—the obstruction to the plaintiff's trade,—was of a mere temporary and personal character. *Chamberlain* v. *West End of London &c. Ry. Co.* (5) is recognized by Lord Westbury in *Ricket* v. *Metropolitan Ry. Co.* (6); and that case is on all fours with *Beckett* v. *Midland Ry. Co.* (2) It will be observed that all the elements of distinction in *Beckett's Case* (2) and *Chamberlain's Case* (5) exist here. The obstruction was a permanent one; the injury was not of a personal character, as, to the trade or the convenience of the plaintiff: but the estate of the

---

(1) Law Rep. 5 H. L. 418.
(2) Law Rep. 3 C. P. 82.
(3) 2 Macq. 229.
(4) Law Rep. 2 H. L. 175.
(5) 2 B. & S. 605, 617; 31 L. J. (Q.B.) 201; 32 L. J. (Q.B.) 173.
(6) Law Rep. 2 H. L. 201.

(5) S.C. [illegible] S. 9 [illegible] 9 — [illegible] 1057.

claimant in his house and premises was injured by deterioration in its market value to the extent of 1900*l*. The case finds that into whosesoever hands the premises might come, their value was permanently depreciated. I therefore think there can be no doubt that the plaintiff is entitled to compensation, upon the principle laid down in *Beckett's Case.* (1)

With respect to the dictum imputed to me in the report of the last-mentioned case, I utterly repudiate it. I never entertained such an opinion; though I may have said that a question of that sort had been suggested.

Willes, J., referred to *Reg.* v. *St. Luke, Chelsea.* (2) There the prosecutor was the lessee of a house and blacksmith's shop and shoeing shop, and the defendants, under the powers of a local Act and the Metropolis Management Acts, 1855 and 1862, caused the level of the footway in the street in which the prosecutor's premises were situate to be raised; the consequence of which was to impede the access to the shop, and so materially damage and injuriously affect the value of the premises: and it was held by the Exchequer Chamber,—affirming the judgment of the Court of Queen's Bench,—that he was entitled to compensation.

Judgment for the plaintiff.

Attorney for plaintiff: *John Edmunds.*
Attorney for defendants: *W. W. Smith.*

---

(1) Law Rep. 3 C. P. 82.

(2) Law Rep. 7 Q. B. 148.

EDWARDS *v.* COOMBE.

1872
June 11.

Bankrupt—Composition under s. 126 *of the Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71)*—Effect of Non-payment of the Composition—Tender—Jurisdiction of the Court.*

It is competent to a non-assenting creditor, notwithstanding a resolution for a composition under s. 126 of the Bankruptcy Act, 1869 (duly registered under s. 127), to sue for his original debt, where the debtor has failed to pay or tender the composition within the time agreed on, or within a reasonable time. The creditor is not restricted to the summary remedy, by application to the Court of Bankruptcy, provided by that section.

Quære, as to the power of the Court of Bankruptcy, under s. 13, or under rule 260, to restrain such an action.

Declaration upon a bill of exchange for 29*l.* drawn by the plaintiff on the 29th of January, 1870, upon and accepted by the defendant, and payable to the plaintiff three months after date.

Plea, that, after the accruing of the causes of action, and before action, the defendant, being unable to pay his debts, duly petitioned the London Court of Bankruptcy, which then had jurisdiction in that behalf, under ss. 125 and 126 of the Bankruptcy Act, 1869, in the form prescribed; and such proceedings were thereupon had that the creditors of the defendant, by an extraordinary resolution resolved that a composition, to wit, of 15*s.* in the pound, should be accepted in satisfaction of the debts due to them from the defendant; and the resolution, with a statement of the defendant as to his assets and debts, were duly presented to the registrar, and the resolution and statement were duly registered by him, and the name and address of the plaintiff and the amount of the debt due to him were shewn in the statement so registered, and produced at the meeting at which the resolution was passed; and all necessary conditions were fulfilled to make the resolution binding on the plaintiff and a bar to the action.

Replication, that the said composition was not paid to the plaintiff before suit. (1)

7 Ch 793,
8 QB 182-3
8 Ex 187, 14
8 Ch 596
— 684,
17 Eq 125,
17 Eq 336
9 CP 98-9
100, -1, -3,
18 Eq 252
16 CB 156
20 Eq 77
1 Ch D 28
1 CP D. 11
114-6-7
1 Ch D. 54
— 706
1 CP D. 270
277,
2 Ch D. 48
5 Ch D. 68
2 CP D. 208

---

(1) In the course of the argument, it was suggested by the Court that the replication did not allege that the time for payment of the composition, or a reasonable time, had elapsed, and that it should be amended in this respect; but Holl said that he should still demur, for that in point of fact the time for payment had elapsed.

Demurrer, on the ground that the resolution registered is a bar to the action, and that the plaintiff has thereby a new right and a new remedy under the Bankruptcy Act. Joinder.

Holl, in support of the demurrer. The question is whether it is competent to a creditor, after a resolution for a composition has been assented to by the required majority of creditors under s. 126 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), and registered pursuant to s. 127, to sue the debtor for the original debt. Sect. 126 enacts that "the creditors of a debtor unable to pay his debts may, without any proceedings in bankruptcy, by an extraordinary resolution, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor." "The extraordinary resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the registrar, and it shall be his duty to inquire whether such resolution has been passed in manner directed by this section, and, if satisfied that it has been so passed, he shall forthwith register the resolution and statement of assets and debts; but, until such registration has taken place, such resolution shall be of no validity." "The provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom, are shewn in the statement of the debtor produced to the meetings at which the resolution has passed," &c. "The provisions of any composition made in pursuance of this section may be enforced by the Court on motion made in a summary manner by any person interested; and any disobedience of the order of the Court made on such motion shall be deemed to be a contempt of Court." Sect. 127 makes the resolution conclusive evidence, in the absence of fraud, that all the requisitions of the Act have been complied with. It was evidently the intention of the legislature that the whole matter should remain under the jurisdiction of the Court of Bankruptcy. The resolution is binding upon the creditors, and can only be questioned or enforced in that court.

[WILLES, J. The last paragraph of s. 126 provides that, "if it appear to the Court on satisfactory evidence that a composition under this section cannot, in consequence of legal difficulties or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the Court may adjudge the debtor a bankrupt, and proceedings may be had accordingly." In the event of that course being resorted to, for what amount are the creditors to prove? For the amount of the composition, or for the original debt?]

For the composition. There can be no hardship in this, all the creditors being equally bound by the arrangement.

[WILLES, J. According to the argument, the agreement to pay, and not payment, is a satisfaction of the debt.]

The creditor has his remedy in the Court of Bankruptcy, and only in that court, so long as the resolution remains in force. In *Berkeley* v. *Elderkin* (1), where it was held that an action will not lie upon a judgment of a county court, Lord Campbell says that, "where new rights are given with specific remedies, the remedy is confined to those specifically given." The policy of this Act, like that of the first County Court Act, 9 & 10 Vict. c. 95, was to provide an easy and speedy remedy.

[WILLES, J. The 280th of the Rules of Procedure under the Act of 1869 provides for security being given for the composition. Suppose the creditors enter into a resolution for a composition, to be secured by the promissory notes of A. and B. within a given time, and that condition not complied with,—the creditors would seek in vain for a remedy in the Court of Bankruptcy, that court having no jurisdiction over A. and B.]

20 Eq 77

In that case the composition would probably be set aside; but, until that is done, the Court of Bankruptcy would, under s. 13 of the Act of 1869, and rule 260, have power to restrain any proceedings to enforce the debt. The whole policy of the Act was to provide a summary remedy, and to confine it to the Court of Bankruptcy. The replication should at all events have averred that the plaintiff had obtained the permission of that Court to sue. *Fessard* v. *Mugnier* (2), *Hazard* v. *Mare* (3), and *Ex parte Hemmingway* (4), were cited, to shew that an *actual* tender of the

---

(1) 1 E. & B. 805; 22 L. J. (Q.B.) 281.

(2) 18 C. B. (N.S.) 286; 34 L. J. (C.P.) 126. 11 Jur NS 283

(3) 6 H. & N. 434; 30 L. J. (Q.B.) 97.

(4) 26 L. T. (N.S.) 298.

(11 SC 17 Jur 1153

1872

EDWARDS v. COOMBE.

composition was not necessary, and that the proper court in which to enforce the terms of the composition is the Court of Bankruptcy.

Roland Williams, contrà, was not called upon.

8 Ex 167

WILLES, J. It seems to me that this replication affords a good answer to the plea. The plea is founded on s. 126 of the Bankruptcy Act, 1869, which provides that the creditors of a debtor unable to pay his debts may resolve that a composition shall be accepted in satisfaction of them, which resolution is to be binding on all the creditors whose names and addresses and the amount of the debts due to them are shewn in the statement produced by the debtor at the meeting; and the provisions of the composition are to be enforced by motion in the Court of Bankruptcy in a summary manner; and if it be found that the composition cannot proceed, the Court may adjudge the debtor a bankrupt. That is the general scope of the section so far as it applies here. When the creditors have resolved upon a composition, if the debtor complies with the conditions of that resolution, or, rather, until he fails to comply with them,—for which purpose he must have a reasonable time,—the resolution is binding upon the creditors. It appears from the case of *Ex parte Hemmingway* (1) that no formal tender of the composition is necessary, but that it is enough if the debtor be ready to pay, and express his willingness to pay. That done, if the creditor declines to receive it, the debtor may set that up as an answer. The creditor cannot be allowed to avoid the effect of the resolution by any evasion on his part. But that is far from saying that the resolution is what the creditors agree to accept in satisfaction. It is difficult to see how it could operate as satisfaction, though it is possible to conceive that a body of creditors might consent to waive the rest of their claims in consideration of a covenant to pay a lesser amount. It is the composition which is to be accepted, not the mere agreement of the other creditors. That must be so, when the last clause of s. 126 is looked at. If it appear to the Court that the composition cannot proceed without injustice, &c., the Court may adjudge the debtor a bankrupt. If the Court adjudges the debtor a bankrupt, he becomes a bankrupt

1 CPD 118

---

(1) 26 L. T. (N.S.) 298.

from the commencement of the proceedings, and the creditors would prove for their original debts, and not for the amount of the composition.

The next question is whether an exclusive jurisdiction in the matter is vested in the Court of Bankruptcy. My impression is that it is not. A remedy is given in that Court which may be very valuable,—for instance, as respects parties coming in as sureties under the 280th rule. The creditor may avail himself of that course of proceeding if he thinks fit; but his ordinary common-law remedy still subsists until he elects to avail himself of the powers of the Court of Bankruptcy. The case of *Berkeley* v. *Elderkin* (1) stands upon a peculiar footing. To allow a plaintiff to sue in a superior Court upon a judgment of the county court would be encouraging the heaping up of costs which it was one main object of the County Court Act to prevent. Such a proceeding might also tend to defeat the arrangements for the payment of debts by instalments, and other peculiar remedies given under that Act. In this case I think that the non-payment of the composition was the failure of a condition going to the whole root of the arrangement, and that the original debt remains and may be resorted to notwithstanding the resolution.

20 L J 773

17 L J 338

I say nothing as to the jurisdiction of the Court of Bankruptcy to restrain the proceedings here. No such order has been made. We dispose of this case without entering into a consideration as to whether it might be more or less desirable that the equitable summary remedy of the creditor should be enforced rather than the ordinary common-law remedy.

BRETT, J. The plea is founded upon an extraordinary resolution passed by the creditors of the defendant, to which the plaintiff was no party. It is consequently binding upon him only so far as it is a valid resolution under s. 126 of the Bankruptcy Act, 1869. I incline to think that the agreement or resolution which is to bind one not a party to it, cannot be an agreement to accept the mere resolution itself as satisfaction, but the payment in pursuance of the resolution, or that which is equivalent to payment. Even if that were not so upon the construction of the statute itself, upon

---

(1) 1 E. & B. 805; 22 L. J. (Q.B.) 281. 17 Jur 1153.

1872

EDWARDS
v.
COOMBE.

these pleadings we must assume that to be the meaning. That being so, the payment or tender of the composition must be made within a reasonable time; and upon the replication, amended as suggested, we must assume that there was no payment or tender within a reasonable time.

Then it is said that the right to sue in a common-law Court is taken away, and that exclusive jurisdiction is given to the Court of Bankruptcy. That argument is founded upon these words in s. 126, "The provisions of any composition made in pursuance of this section may be enforced by the Court on motion made in a summary manner by any person interested." It seems to me very difficult to see how the original agreement or resolution could be enforced after the lapse of a reasonable time; it would in effect be making a new agreement. But, assuming that any creditor could enforce it by a summary application to the Court of Bankruptcy, how can that oust the jurisdiction of the Courts of common law? Mr. Holl relies upon *Berkeley* v. *Elderkin*. (1) I do not think that case has any application. A new and very large jurisdiction was given to the county courts under 9 & 10 Vict. c. 95. The results of a judgment in the county court are so different from those of a judgment of a superior Court, that the legislature must necessarily have intended that the jurisdiction of the latter to enforce it should be ousted. Then, if I am to assume that the Court of Bankruptcy has power to restrain a proceeding in this Court for the recovery of the original debt, that presses more against Mr. Holl's argument than anything he could have urged; for the injunction to restrain proceedings assumes the jurisdiction of the Court whose proceeding is to be restrained. The conclusion I come to is, that, as the terms upon which the original debt was to be considered as satisfied have not been fulfilled, the debt remains. I therefore think that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

Attorney for plaintiff: *John Craven.*
Attorneys for defendant: *Dalton & Jessett.*

---

(1) 1 E. & B. 805; 22 L. J. (Q.B.) 281.

17 Jul 158

[IN THE EXCHEQUER CHAMBER.]

1872
June 18.

162
8CP.5,6,7,
9,
9CP59
4CPD162.
161–2

PAPPA *v.* ROSE.

Arbitration—Broker made Referee to determine whether or not Goods are of the Quality contracted for.

The defendant, as broker, made a contract for the plaintiff, the seller, as follows:—"Oct. 26, 1869. Sold by order and for account of Mr. D. P., to my principals, Messrs. S. H. & Son, to arrive, 500 tons Black Smyrna raisins—1869 growth—fair average quality in opinion of selling broker—To be delivered here in London @ 22*s.* per cwt.—D. pd.—Shipment November or December, 1869," &c.:—

Held, by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that the defendant was employed as a sort of arbitrator to determine between the parties any difference which might arise as to the quality of the raisins tendered in fulfilment of the contract; and, consequently, that he was not liable to an action for failing to exercise reasonable care and skill in coming to a decision,—he having acted bonâ fide and to the best of his judgment.

APPEAL from the decision of the Court of Common Pleas, in discharging a rule for a new trial on the ground of misdirection.

The defendant, as broker, made a contract for the plaintiff, the seller, as follows:—

"London, October 26, 1869.

"Sold by order and for account of Mr. D. Pappa to my principals, Messrs. S. Hanson & Son, to arrive, 500 tons Black Smyrna rasins—1869 growth—fair average quality in opinion of selling broker—To be delivered here in London @ 22*s.* per cwt.—D. pd.—Shipment November or December, 1869—If not delivered, buyer to be allowed 1*s.* per cwt.—In bags—bags included in weight—Customary allowances. Discount 1 %. Prompt two months from date of final landing.

(Signed) "James Rose."

This action was brought by the seller against the broker for an alleged breach of duty in omitting to use due care, skill, and diligence in sampling and examining the raisins, and in certifying that they were not in his opinion of fair average quality within the meaning of the contract.

The pleadings and facts are sufficiently set out antè, p. 32.

1872

PAPPA
v.
ROSE.

Sir John Karslake, Q.C. (*Watkin Williams* with him), for the plaintiff. He contended that the true construction of the contract was that the raisins were to be fruit of fair average quality of 1869 growth, and that, as the evidence shewed that they were in fact of fair average quality of that year's growth, the defendant, as broker, who was to determine that question between the parties, had failed to bring to the performance of the duty he had undertaken that due amount of skill and knowledge which he was bound to bring. He referred to *Harmer* v. *Cornelius* (1) and *Jenkins* v. *Betham.* (2) The duty of examining and declaring his opinion upon the goods is cast upon the defendant by the contract itself, which he himself drew: and it is an ordinary form of contract. An action would clearly lie against him for refusing to examine the goods at all. He is not, as was suggested in the Court below, a mere arbitrator.

[BLACKBURN, J. I am not prepared to say that he would not have been liable if he had refused to look at the raisins. But that is very different from saying that he is bound to bring to the examination any particular amount of skill. The parties take him for better or for worse.]

If a man chooses to undertake a duty for which he possesses no qualification at all, he surely ought to be liable to an action.

Giffard, Q.C. (*J. P. Murphy* with him), contrà, was not called upon.

KELLY, C.B. If it were necessary to determine whether the contract was for raisins of the growth of 1869 or of fair average generally, I should not have hesitated to hold that the undertaking was distinct that the raisins should be of the growth of 1869 and also of fair average quality generally. But that point does not necessarily arise before us. The question for us to consider is, not whether the defendant, as the broker employed to make the contract, was bound to exercise due and reasonable care and skill as a broker; but whether he has undertaken, not only to use due and reasonable care and skill in his profession as a broker, but also to exercise due skill in coming to a correct opinion as to the quality of the raisins tendered in fulfilment of the contract. I am

---

(1) 5 C. B. (N.S.) 236; 28 L. J. (C.P.) 85.
4 Jur. N.S. 1110

(2) 15 C. B. 168; 24 L. J. (C.P.) 94.
1 Jur. N.S. 237

1872

PAPPA v. ROSE.

clearly of opinion that there was no obligation on him to exercise or employ or to be possessed of any degree of skill whatever. This defendant certainly has entered into a contract of a very unusual kind. Ordinarily speaking, the broker simply makes the contract between buyer and seller. But in this case the contract is framed in such terms as to raise the question whether he has not further undertaken to exercise due care and skill to do that which was necessary to give effect to the contract between the principals, so as to enable one of them to maintain an action against him for the breach of duty in that respect. Having entered into this contract, the defendant probably bound himself to declare his opinion. But, did he undertake anything more? Sir John Karslake was unable distinctly to define the defendant's duty under this contract. He may have been bound to look at the raisins, and to declare his opinion as to whether or not they satisfied the terms of the bargain. But I am clearly of opinion that he did not undertake to bring any degree of skill to the investigation. It is for the parties themselves to take care that the person in whose judgment they confide shall possess the requisite skill to exercise it properly. I agree that the position of this defendant differs in some respects from that of an arbitrator: the expression seems to have been used rather with a view to assist the Court in coming to conclusion as to the real nature of the contract. If two persons agree to submit matters in difference to a third, no obligation is thereby cast upon such third person to declare his opinion. But, if he is a party to the contract of reference, it may be different. If A. and B. agree to submit differences to arbitration, and the referee becomes a party to the contract, it may be that he is as much bound as the other two parties to abide by the award. But, if you go further, and suppose that the arbitrator undertakes that he possesses the requisite degree of skill, the analogy altogether fails. Although the arbitrator may be bound by an express contract to deliver his award, he does not undertake that he possesses any amount of skill. How often is a matter referred to a surveyor or to a merchant, who may be supposed to possess a certain amount of professional or mercantile knowledge: but, has it ever been suggested that, if any question of law arises in the course of the investigation, the surveyor or the merchant is under any obligation

1872

PAPPA v. ROSE.

to possess any skill or knowledge of law? The parties themselves must be supposed to see that the person whom they select to decide their differences possesses the requisite knowledge. On that simple ground, that there is no contract express or implied that the broker should exercise or possess any particular amount of skill, I am of opinion that this action, which charges the defendant with a failure in that respect, is not maintainable. I am, therefore, of opinion that the judgment of the Court of Common Pleas should be affirmed.

MARTIN, B. I am of the same opinion. This is a contract for the sale of a certain quantity of raisins which are to be of a given growth and quality; but the contracting parties agree that the opinion of the selling broker shall decide that matter. I see no contract either express or implied on the part of the broker to bring to the examination of the fruit tendered any particular degree of skill.

BLACKBURN, J. I also am of opinion that the judgment of the Court of Common Pleas should be affirmed. I give no opinion upon the first question, viz. whether the contract means that the raisins shall be equal to the fair average of any number of years or merely fair average of 1869 growth; for, our opinion upon the second point renders it unnecessary to do so. Now, the defendant was employed as broker, and must be supposed to undertake that he possesses and will exercise a reasonable degree of skill in the exercise of his duty as a broker. But both parties to the contract consent that the question what is a fair average quality shall be determined by the opinion of the broker. Upon that subject he is to form an opinion; and he has done so. I do not stop to inquire whether the defendant stood in the position of an arbitrator or not. But he was bound to exercise his judgment impartially between the two contracting parties. The question is, how far he is liable if he has given an erroneous opinion. The Court below seem to have thought that the defendant might have been liable for a breach of duty, or a breach of contract, if he had altogether declined to examine the raisins, but that, provided he acted honestly, he was not responsible for an error in judgment. I think it would

.CPD 155

be extremely dangerous to hold that either party could bring an action under such circumstances. The case of *Jenkins* v. *Betham* (1) does not affect this question. There, the defendants declared themselves to be persons possessed of proper skill in valuations.

MELLOR, J. I am of the same opinion. If it had been necessary to decide the first question, I should have desired time to consider. As at present advised, I am not satisfied that the opinion expressed by Bovill, C.J., at the trial was correct. But, upon the second point, I entertain no doubt whatever. It is contended that the defendant not only promises that he will do the work of a broker, but also that he will bring a competent degree of skill to the consideration of the matter submitted to his judgment. I think there is no such undertaking here, and that it would be extremely mischievous to hold that there is. The contracting parties agree to be bound by the opinion of Mr. Rose, such as it is, he exercising his judgment honestly; and there is no suggestion that he did not do so. The decision of one of the points in favour of the defendant is enough to sustain the judgment of the Court below. *Jenkins* v. *Betham* (1) has no application to the present case; and even that was a case of the first impression.

LUSH, J. I am of the same opinion; and I have nothing to add.

Judgment affirmed.

Attorneys for plaintiff: *Thomas & Hollams.*
Attorneys for defendant: *Stibbard & Beck.*

---

(1) 15 C. B. 168; 24 L. J. (C.P.) 94. Jur NS 237

1872
June 18.

[IN THE EXCHEQUER CHAMBER.]

ALEXANDER *v.* VANDERZEE.

Construction of mercantile Contract—Duty of Judge and Jury—Cargo "for Shipment in June and [*or*] *July.*"

9 CP 21-2
1QBD470
472-4-5,
QBD. 112-3
114-5,-6
app Cas 455
458, 460,-6-7
471-2,-8,
52-3-4.

The defendant contracted for the purchase of a large quantity of Danubian maize "fair average quality of the season and port of shipment when shipped. To be shipped from Danube, &c., by three or more first-class vessels. For shipment in June and [or] July, 1869 (old style), seller's option," &c.

In fulfilment of the contract on the part of the seller two cargoes of maize were tendered to the defendant, the bills of lading for which were dated respectively the 4th and 6th of June, 1869. The loading of these two cargoes was commenced respectively on the 12th and 16th of May, and completed on the 4th and 6th of June; somewhat more than the half of each cargo having been put on board in May. There was evidence that grain shipped in May was more likely to damage by heating than grain shipped in June.

It was left to the jury to say whether in their opinion the cargoes in question were "June shipments" in the ordinary business sense of the term; and they found that they were. The judge was of the same opinion, and directed a verdict for the plaintiff:—

Held, in the Exchequer Chamber, by Martin, B., Blackburn, Mellor, and Lush, JJ., Kelly, C.B., dubitante,—affirming the judgment of the Court of Common Pleas,—that the conclusion was right.

Held, also, by Martin, B., and Lush, J., Kelly, C.B., and Blackburn, J., dubitantibus, that the question was one for the jury.

APPEAL from a decision of the Court of Common Pleas discharging a rule to enter a nonsuit.

The action was brought to recover 582*l.* 7*s.* 8*d.* damages sustained by the plaintiff by reason of an alleged breach by the defendant in rejecting certain maize tendered to him by the plaintiff in execution of a contract of sale. The cause was tried before Brett, J., at the London sittings after Trinity Term, 1871. The facts were as follows:—On the 10th of October, 1868, the plaintiff entered into a contract with Spartali & Co., merchants of London, for the purchase from them of 10,000 quarters, 10% more or less, of Danubian maize, upon the terms of the following contract-note:—

"London, October 10th, 1868.

"Sold by order and for account of Messrs. Spartali & Co., London, to our principals, 10,000 quarters, 10% more or less (seller's option), Danubian maize fair average quality of the season and port of shipment when shipped. To be shipped from Danube and [or] Sulina and [or] Kustendjee, seller's option, by three or more first-class vessels, at seller's option, A. 1, A. 1, in red, 3/3ds, 5/6ths, 1. 1., or equal classification, in Austrian or Italian register (Greeks and Turks excepted). *For shipment in June and* [*or*] *July*, 1869 (old style), seller's option, at the price of 31s., less 2 per cent., per quarter f. o. b. of 480lbs. delivered, including freight and insurance to any safe port in the united kingdom of Great Britain and Ireland, or continent between Havre and Hamburg if c/p contain option (buyers paying extra freight and insurance), calling at Queenstown, Falmouth, or Plymouth, &c., for orders, as per charterparty. Vessel to discharge afloat if so agreed; sufficient days to be allowed for discharging, reckoning provisionally 100 kilos equal to 232 qrs., and the weight at 58lbs. per bushel. No charge for dunnage. Railway weight, if from Kustendjee. If discharged on continent, out-turn to be calculated at 50¾ kilos, 112lbs. English. Payment, cash in London within seven days after presentation of invoice, less discount for unexpired portion of three months from date of bill of lading at 5 per cent. per annum, or at Bank rate if over this, on the day on which the invoice is handed in exchange for bills of lading and policies of insurance effected with approved London underwriters, but for whose solvency sellers are not responsible. Damage by sea water or otherwise, if any, to be taken as sound. In case of sea accidents (pumping up grain excepted) causing a deficiency on invoice weight, provisional invoice quantity is to be final as to measure, and the weight is to be adjusted by the average weight of the sound grain delivered. Sellers to pay our brokerage of ½%. Policies of insurance for 2 per cent. over the invoice amount including the 2½ per cent.; any amount over this to be for seller's account. In case of prohibition of export or blockade preventing shipment, the contract to be cancelled. Should any dispute arise, contract not to be void: it being agreed by buyers and sellers to leave the same to be settled by two London corn-factors respectively chosen, with power to call in an umpire, whose decision is to be final. Vessels to be of non-belligerent flag at time shipment commences, otherwise war risk is to be covered."

On the 14th of October it was agreed between the plaintiff and defendant that the latter should take the maize of Spartali & Co., and that the contract should be transferred to him, subject to the terms contained in the following memorandum indorsed upon the contract-note.

"London, October 14, 1868.

"We have sold the within contract to Messrs. H. U. Vanderzee & Co., of London, at the price of 31s. per 480lbs., less 2 per cent., to U. K. for orders or direct port on continent between Havre and Hamburg; if latter, name of port to be given on signing bill of lading. No cargo to exceed 4000 qrs; and each cargo to be full and complete, and on account of this contract alone; and each ship to carry no goods whatever for other consignees. (Signed) Alexander & Co."

In July, 1869, the plaintiff offered to deliver to the defendant, in part fulfilment of the contract, two cargoes of maize for the vessels *Murzi* and *Giacinto*. The bills of lading of these cargoes were dated respectively the 4th and 6th of June, 1869, O. S.; and the maize had been loaded on board these vessels at the following dates, that is to say, the landing of the *Giacinto* was commenced on the 12th of May, 1869, O. S., and she loaded 650 kilos in May, and it was completed on the 4th of June, O. S., 830 kilos having been loaded in June. The loading of the *Murzi* was commenced on the 16th of May, and was completed on the 6th of June, O. S., 800 kilos having been loaded in June. The defendant rejected the offer of these cargoes, and absolutely refused to take them.

During the time remaining for the fulfilment of the contract after the defendant had rejected the above two cargoes, there were in the market many cargoes of maize from the Danube of the stipulated quality and quantity, every portion of which had been shipped within the months of June and [or] July, which the plaintiff could have bought and delivered under the contract.

There was some evidence that a cargo of maize shipped in May is generally more liable to be heated than a cargo shipped in the month of June.

It was submitted for the defendant, 1. That the cargoes per *Murzi* and *Giacinto* were not cargoes which the defendant was bound to accept under the contract; 2. That the question of the construction of the contract was for the judge and not for the jury.

The learned judge left it to the jury to say whether in their opinion the cargoes in question were June shipments from Ibraila in the ordinary business sense of the term. The jury found that they were June shipments; and the judge thereupon directed a verdict for the plaintiff for 582*l.* 7*s.* 8*d.*, reserving leave to the defendant to move to enter a verdict for him or a nonsuit, if the Court should be of opinion that the defendant was not bound to accept the above cargoes, as not being June shipments.

A rule nisi was afterwards obtained, but ultimately discharged: see W. N. for 1871, p. 225.

Butt, Q.C. (*Cohen* with him), for the appellant. A substantial part of the cargoes tendered having been shipped in May, they were not June shipments within the contract, and therefore the defendant had a right to reject them.

[BLACKBURN, J. I should say that the meaning of the contract was that the shipments were to be completed in June or July, so that the vessels might sail in either of those months. The jury have found them to be June shipments.]

The construction of the contract was for the judge, and he ruled wrongly. In the absence of any evidence of usage, there was nothing to leave to the jury. According to the ordinary construction of the words of the contract, the loading must have commenced in June and finished in June or July. The plaintiff cannot rely upon the other cargoes alluded to, because none were tendered.

Sir G. Honyman, Q.C. (*Watkin Williams* with him), contrà, was not called upon.

Kelly, C.B. The majority of the Court are of opinion that the judgment of the Common Pleas should be affirmed. For myself, I must confess I feel much disposed to say, that, as it was not suggested at the trial that the words of the contract had any technical meaning (in which case it would have been a question for the jury), but are words of ordinary use in the English language, its construction was for the judge. The natural meaning of the words, as it seems to me, is that the cargoes should be shipped in June or July, and not partly in May; particularly when I find that there was evidence that a May shipment was more likely to heat than a June shipment. But, as all my learned Brethren entertain a contrary opinion, I do not desire to differ from them.

Martin, B. I think the judgment of the Court of Common Pleas was quite right. Mr. Butt invites us to hold that, if any part, that is, any substantial part, of the maize was put on board in May, the defendant was justified in rejecting it. That is not in my opinion the true construction of the contract. The words are "For shipment in June and [or] July, seller's option." The more intelligible meaning of those words, I think, is, not that the grain shall be ready for shipment in those months, not that it shall all be put on board in those months, but it shall be so loaded that the ship may sail in June or July. I think it was not a question for the judge, but for the jury; and that my Brother Brett was quite right in leaving it to them.

2 App Cas
460

Blackburn, J. I also am of opinion that the judgment of the Court below should be affirmed. Generally speaking, the con-

1872

ALEXANDER
v.
VANDERZEE.

struction of a written contract is for the Court, unless it contains words of a technical or conventional use in a particular trade, in which case it is for the jury. In the present case, I am not quite prepared to say, if the judge and the jury took different views of the meaning of the contract, which construction ought to prevail. The contract is for 10,000 qrs. of grain "for shipment in June and [or] July, 1869." The construction contended for by Mr. Butt is that all the cargoes must be put on board not earlier than the 1st of June, or between that day and the 31st of July. The bill of lading would be given when the shipment was completed. A bill of lading commencing, "Shipped this 4th day of June," I should say, meant, not that the shipment was commenced in June, but that it was completed in June. And so I should construe this contract. And the jury, bringing to the consideration more knowledge of mercantile matters than a judge can possibly possess, came to the same conclusion.

MELLOR, J. I am entirely of the same opinion.

9 CP. 72

LUSH, J. I am of the same opinion. The words "for shipment in June or July" have no definite meaning, whether grammatical or otherwise. They may either mean that the shipment of the grain shall be completed in June or July, or that the whole shall be shipped within those months. I think the opinion of the jury was properly asked; and, with great deference to the Lord Chief Baron, I think the rule he adverted to is inapplicable here.

Judgment affirmed.

Attorneys for plaintiff: *Thomas & Hollams.*
Attorneys for defendant: *Simpson & Cullingford.*

ARDEN AND ANOTHER, APPELLANTS; SIR JOHN MARYON WILSON, BART., RESPONDENT.

1872
June 6.

Copyhold—Compulsory Enfranchisement—Assessment of Compensation to the Lord—Facility for Building Purposes—15 *&* 16 *Vict. c.* 51, *s.* 16 —*Settled Estates Act,* 19 *&* 20 *Vict. c.* 120.

In assessing the amount of compensation payable to the lord on a compulsory enfranchisement of a copyhold tenement under 15 & 16 Vict. c. 51, regard is to be had, not only to the capability of the land for future improvements, but also to any present obstacles which may stand in the way of improvements.

Where, therefore, copyhold lands were the subject of a settlement (by will) which precluded the granting of leases for more than twenty-one years, and a portion of them was at the time of the enfranchisement held by a third person under a lease granted with the licence of the lord, and the other portion could have no frontage to a public road pending such lease:—

Held, that, in assessing the compensation payable to the lord, the valuers were not bound by the mode in which the property was then enjoyed, viz. as a private residence, but might take into consideration the capacity of the land for improvement by applying it to building purposes.

But, *held*, that they were also bound to take into their consideration the impediments standing in the way of its being presently used as building land.

SPECIAL case for the opinion of the Court under the Copyhold Act, 1852, 15 & 16 Vict. c. 51.

1. Douglas Arden and Henry Augustus Webber are legal tenants in fee according to the custom of the manor of Hampstead, Middlesex, of a messuage or dwelling-house and lands situate at Hampstead, the ground-plot, abuttals, and boundaries whereof were shewn in that part of the map annexed to the case which was coloured pink and brown.

2. The messuage and land coloured pink on the map are in the occupation of one Elder by virtue of a lease dated the 29th of September, 1860, made between John Pittman of the one part and Lang of the other part, whereby the messuage and land were demised by Pittman to Lang, his executors, &c., from that day for the term of twenty-one years, at the yearly rent of 300*l.*, with power to Lang, his executors, &c., to determine the lease at the end of the seventh or fourteenth year by a six months' notice; and when the lord of the manor gave notice of enfranchisement twelve years of the term were unexpired.

3. Notice by Lang to determine the lease has not been given.

4. The lease was granted by virtue of a licence from the then lord of the manor, which licence was expressed to be "saving and reserving unto the lord or lady lords or ladies of the manor aforesaid for the time being, all and all manner of fines accruing on the death or alienation of any customary tenant of the said premises, not only according to the annual value of the said premises at this present time, but also according to the annual value of the same from time to time when such fines shall happen, although such value shall arise by new buildings erected in the meantime, or improvements thereof, or otherwise; reserving also to the lord or lady lords or ladies of the manor aforesaid for the time being all and all manner of rents, amerciaments, forfeitures, and services for the said premises due and of right accustomed, in manner and form as if this licence had not been made."

5. The above lease is a valid and subsisting lease; and the messuage and lands thereby demised are now and have been for many years used and occupied as a gentleman's residence, with the buildings, grounds, and appurtenances. The piece of land coloured brown in the plan is let by Arden to a yearly tenant, at the yearly rent of 30*l*. (1)

6. Arden and Webber are with one Hampshire trustees of the will of Edward Carlile, deceased (a former tenant of the said copyhold hereditaments), dated the 5th of October, 1830; and Arden and Webber, who alone were under the sanction of the Court of Chancery admitted tenants to all the said copyhold hereditaments, hold them upon the trusts declared thereof by the will,—the subsisting trusts being now for Janette Ann Willoughby, widow, for her life, and, after her decease, for all and every her children and child who, being a male or males, shall attain the age of twenty-one years, and who, being a female or females, shall attain such age or marry under that age, as tenants in common in fee.

7. The will contains a power for the trustees to lease all or any

---

(1) It appeared from the map annexed to the case that the piece of land coloured brown had no access to the public highway, except through the land under lease and coloured pink.

of the copyholds for any term or terms of years not exceeding twenty-one years, in possession, at the best rent; but does not contain any other power of leasing, or any power of sale.

9. On the admission in the year 1868 of Arden and Webber as tenants of the copyhold hereditaments, an agreed sum of 700*l.* was paid as a fine to Sir Thomas M. Wilson, the then lord of the manor; but that sum was calculated and arranged on the basis of the rent of 330*l.*, being then and now the actual rent of the lands.

10. Sir Thomas M. Wilson, who was tenant for life of the manor, died in 1869, and was succeeded by Sir John M. Wilson, who is now lord of the manor for his life only.

11. On the 5th of November, 1869, Sir John M. Wilson gave due notice to Arden and Webber, pursuant to the provisions of the Copyhold Acts, of his desire that the lands copyhold of the manor to which Arden and Webber were admitted as aforesaid should be enfranchised under the said Acts; and soon afterwards two valuers were appointed, one by Sir John M. Wilson, and the other by Arden and Webber: but the valuers were unable to agree on the amount of compensation to be payable to the lord of the manor for the enfranchisement.

12. The valuer appointed by the lord claimed to value the property as building land, having regard to its situation and aptitude for building; and the matter having, by reason of the difference of the valuers, become referable to their umpire, and other questions of law and fact having arisen between the parties, Arden and Webber, under the authority of the Copyhold Act, 1852, referred the questions in dispute to the copyhold commissioners, stating the following questions for their determination:—

(1.) Whether that part of the lands with the house and buildings thereon which is held by Elder should for the purposes of the enfranchisement be valued only as land used and occupied as it now is, viz. as a gentleman's private residence, with the usual adjuncts, or how otherwise?

(2.) Whether the remaining part of the lands should for the purposes of the enfranchisement be valued only as land used and occupied as it now is, viz. as meadow or pasture land, or how otherwise?

(3 and 4.) These questions are not material to the present case.

(5.) Whether the part of the lands held by Elder, being so held for a term of twenty-one years from the 29th of September, 1860, determinable by Elder, his executors, &c., granted to him by indenture of lease dated on that day by Pittman, with the licence of the lord, should not be taken into account in making the valuation for the purposes of the enfranchisement, as being against and as standing in the way of or preventing facilities for improvement of the said lands?

(6.) Whether, as the estate in the lands is under the will of Carlile to be held by trustees with a power of leasing for a term or terms not exceeding twenty-one years, that fact should not be taken into account in making the valuation for the purposes of the enfranchisement, in reduction of the compensation or consideration payable to the lord?

13. The questions thus submitted to the copyhold commissioners were referred by them to one of the assistant commissioners; and the above questions were argued before him by counsel on both sides, witnesses being sworn and examined. The appellants and the assistant commissioner, after having heard the evidence on the part of the respondent, went to Hampstead and viewed the appellants' land. The assistant commissioner, by writing under his hand, dated the 2nd of July, 1870, determined and decided as follows:—

(1.) That that part of the lands with the house and buildings thereon which is held by Elder should not for the purposes of the enfranchisement be valued only as land used and occupied as it now is, viz. as a gentleman's private residence, with the usual adjuncts; but that it should be valued as calculated for the purposes of building, and forming the necessary approaches incident to such purposes; subject, nevertheless, to a restriction (1) that no building can be erected on the land within 20 feet of the centre of the public road abutting on the land, and subject, as to a portion of the land containing about 12½ rods, and situate at the south-eastern angle of the land, to a right of carriage-way over the same for the occupiers for the time being of a meeting-house and garden thereto adjoining that portion of the land.

(2.) That the remaining portion of the lands should not for the purposes of the enfranchisement be valued only as land used and occupied as it now is, viz. as meadow or pasture land; but that the whole of such remaining part should for the purposes of the enfranchisement be valued as calculated for building purposes, and forming the necessary approaches incident to such purposes.

(5.) That the fact of the part of the lands held by Elder being so held for a term of twenty-one years from the 29th of September, 1860, determinable by Elder, his executors, &c., granted to him by indenture of lease dated that day by Pittman, with the licence of the lord of the manor of Hampstead, should not be taken into account in making the valuation for the purposes of the enfranchisement, as being against and as standing in the way of or preventing facilities for improvement of the lands.

(6.) That the fact of the estate in the lands being held under the will of Carlile by trustees with a power of leasing for a term or terms not exceeding twenty-one years, should not be taken into account in making the valuation for the purpose of the enfranchisement, in reduction of the compensation or consideration payable to the lord.

---

(1) By statute.

14. The tenants, Arden and Webber, appeal against the first, second, fifth, and sixth of the items of the decision of the assistant commissioner.

15. Those portions of the lands shewn on the plan, and marked with a dotted red line, and numbered 1 and 2 respectively, were formerly waste of the manor. The lord of the manor has by custom the power, with the consent of the homage, to grant out portions of the waste, to be held by the grantee as copyhold of the manor; and each of the grants of the pieces of land numbered 1 and 2 respectively were duly made in conformity with the custom in the years 1819 and 1822 respectively; and each of the grants was "upon condition that no erection or building whatever should be at any time thereafter made on any part of the said ground, and that no trees be planted thereon to grow for timber, and that the fence to be put up for inclosing the said piece of ground be not made higher than three feet above the level of the public road running near to the said ground."

16. Arden and Webber, as owners of the land coloured pink and brown on the plan, claimed rights of way only from the points lettered A. to J. on the plan to the high road, over the land coloured blue, part of the waste of the manor, for the purposes of access to and regress from the high road.

17. Having regard to the facts hereinbefore stated, and that the frontages to the lands to the aforesaid roads are such only as are hereinbefore stated, and that the entire estate is in settlement, as stated in par. 6, and is, with the exception of about two acres, subject to the lease mentioned in par. 2, of which ten years are now unexpired, the tenants Arden and Webber appeal from the first, second, fifth, and sixth items of the decision of the assistant commissioner, and contend that the estate ought not for the purposes of the enfranchisement to be now valued as building land or land calculated for building purposes. The lord contends that the decision of the assistant commissioner is correct, and that the estate under the circumstances and upon the evidence hereinbefore referred to, ought to be now valued as building land or land calculated for building purposes.

The questions for the opinion of the Court are,—

1. Whether that part of the lands with the house and buildings

thereon which is held by Elder, should for the purposes of the enfranchisement be valued only as land used and occupied as it now is, viz. as a gentleman's private residence, with the usual adjuncts, or how otherwise?

2. Whether the remaining part of the lands should for the purposes of the enfranchisement be valued only as land used and occupied as it now is, viz. as meadow or pasture land, or how otherwise?

3. Whether the fact of the part of the lands held by Elder, being so held for a term of twenty-one years from the 29th of September, 1860, determinable by Elder, his executors, &c., granted to him by the indenture of lease dated on that day, with the licence of the lord of the manor, should not be taken into account in making the valuation for the purposes of the enfranchisement, as being against and standing in the way of or preventing facilities for improvement of the land?

4. Whether, as the estate in the lands is under the will of Edward Carlile, dated the 5th of October, 1830, to be held by trustees with a power of leasing for a term or terms of years not exceeding twenty-one years, that fact should not be taken into account in making the valuation for the purposes of the enfranchisement, in reduction of the compensation or consideration payable to the lord?

Joshua Williams, Q.C. (*Willoughby* with him), for the appellants. The 15 & 16 Vict. c. 51, s. 16, which prescribes the principle on which the valuation is to take place, enacts that, "in making the valuation under this Act, the valuers shall take into account the facilities for improvement, customs of the manor, fines, heriots, reliefs, quit-rents, chief-rents, escheats, forfeitures, and all other incidents whatever of copyhold or customary tenure, *and all other circumstances affecting or relating to the land* which shall be included in such enfranchisement, and all advantages to arise therefrom, and shall make due allowance for the same." The valuer, therefore, in estimating the compensation payable to the lord, was bound to take into consideration the impediments which stand in the way of a more profitable user of the land than its present user, viz. the lease to Lang, and the settlement of the 5th of

October, 1830. Under the Succession Duty Act, 16 & 17 Vict. c. 51, the annual value is the actual annual value of the property in its condition and as used for the purposes to which it is devoted at the time when the successor becomes entitled in possession: *Attorney-General* v. *Earl of Sefton.* (1) The judgment of this Court in *Lingwood* v. *Gyde* (2) lays down the principle by which the commissioners ought to have been guided in this case. The lord is to be paid for what he gives up, and he is to receive compensation for the benefit resulting to the tenant from the enfranchisement. The mode of valuation is also discussed in *Brabant* v. *Wilson.* (3) "We have only to look," says Cockburn, C.J. (4), "to what is fairly the value of the land. If there had been anything that would have enabled anybody to come forward and insist on and enforce the reservation preventing the tenant from building, undoubtedly it would have been in the highest degree unjust to compel the tenant to pay the lord of the manor the full value of the tenement as though it could be applied to building purposes." It is clear, therefore, that the copyholder in this case was entitled to have the restrictions imposed by the existing lease and the settlement taken into consideration in estimating the amount of the lord's compensation. As to the portion of land coloured brown on the map, the fact that the only access to it was through the land under lease ought also to have been taken into consideration.

J. Brown, Q.C. (*Holl* with him), for the respondent. The third and fourth are the only material questions; but the commissioners desire to have all the questions answered, for their guidance in ascertaining the value of the lord's compensation. Whether the enfranchisement is at the instance of the lord or of the tenant is immaterial; both are put upon the same footing, save that by s. 30 the costs are to be borne by the party requiring the enfranchisement. The compensation payable is to be measured by the capability of the land for improvement; the present rent is no criterion of value: *Lord Verulam* v. *Howard* (5): nor is the use to which

---

(1) 2 H. & C. 362; 32 L. J. (Ex.) 230. Affirmed in the House of Lords, 11 H. L. C. 257; 34 L. J. (Ex.) 98.

(2) Law Rep. 2 C. P. 72.

(3) Law Rep. 1 Q. B. 44.

(4) Law Rep. 1 Q. B. at p. 51.

(5) 7 Bing. 327.

11 R C S from H.S. 1898

1872

ARDEN
v.
WILSON.

the land is at present put. One of the "facilities for improvement" here is, that the land may either now or at some future period be used as building land. That is distinctly recognized in the two cases cited, of *Brabant* v. *Wilson* (1) and *Lingwood* v. *Gyde.* (2) *The Attorney-General* v. *Sefton* (3) has no application to the present case; the decision there turned upon the particular language of the section imposing the duty. In construing an Act imposing a tax upon the subject, if there be any doubt, the Courts will always decide in favour of that interpretation which imposes the smallest burthen. As to the lease, all that can be said is that the tenant has by his own act,—for the lord is no otherwise a party to the lease than by granting a licence, to prevent a forfeiture, for which he receives a small fine,—precluded himself from building for the residue of the term, unless he and the lessee agree upon terms. And as to the settlement (will of October, 1830), how can the tenant thereby affect the lord's rights? Besides, all difficulty arising from that is removed by the Act for facilitating the leasing of settled estates, 19 & 20 Vict. c. 120, ss. 1, 2.

[KEATING, J. That would involve expense and possible risk.]

That would be taken into account in assessing the value.

WILLES, J. The case of *Lingwood* v. *Gyde* (2) has established that in making a valuation of this kind regard is to be had to the capability of the land for future improvements. We retain the opinion which we expressed yesterday, that, if the land were in a condition to be sold immediately for building purposes, some regard is to be had to that circumstance in making a valuation for the purpose of enfranchisement. There is a large discretion in the valuer, and a discretion, according to the case referred to, to be exercised even with reference to the person by whom the notice is given. But we think it is a mistake to suppose that this Court intended to lay it down,—and, having read the judgment, I am satisfied that the Court did not lay it down, and never intended to lay it down,—that the power of converting the property into building land is to be taken into account, even though the land cannot immediately be made available for that purpose. We are of opinion that the lease and the settlement must be taken into account in this case as obstacles in the way of building; and that the fact of a portion of the property being under lease in the hands of a third person, who holds under circumstances in which the lord is equally bound by the lease as the copyholder is, cannot be excluded from consideration. As between the lord and the copyholder, it must be assumed that there can be no building during the term covered by the lease. It is true that the copyholder might buy up the lessee's interest, and so acquire the present power of using the land more advantageously. That, however, is a chance quite out of the contemplation of the statute; it is not a circumstance which can be taken into account as affecting the present value of the land. The lease must be considered as a fixed thing; and the land must be dealt with only as land which has a capacity of improvement by the copyholder after the expiration of the term. With regard to the settlement,—it does not absolutely prevent the land from being applied for building purposes; but it presents considerable difficulties in the way of so using it. It is a circumstance to be taken into account; and it is one which, looking at the statute, and considering that, with regard to future advantages, such only as are probable and likely are to be paid for, subject to the contingencies which necessarily affect most future things and detract from their value, is very material. All these matters are to be taken into consideration, and some of them for this reason, that there is only one customer in the market, viz. the copyholder, and that the price he would be willing to pay would be determined by his means of making the purchase available.

---

(1) Law Rep. 1 Q. B. 44.

(2) Law Rep. 2 C. P. 72.

(3) 2 H. & C. 362; 32 L. J. (Ex.) 230; in House of Lords, 11 H. L. C. 257; 34 L. J. (Ex.) 98, Jur. N S 1296

For all these reasons, and looking at the terms of the 16th section of 15 & 16 Vict. c. 51, we think they fully justify the decision of this Court in *Lingwood* v. *Gyde*. (1) Those words are,—"In making any valuation under this Act, the valuer shall take into account the facilities for improvements,"—which clearly relate to future improvements, and which words must be considered as qualified by the contingencies which would prevent its being facile to improve; one of which in this case would be the lease during the currency of the term, the other, the settlement, subject to the power to obtain the leave of the Court of Chancery, under the 19 & 20 Vict. c. 120, to grant building leases, and the trouble and expense incident to such an application. Then follow some words which may be omitted; and then come these words, "and all other incidents whatever of copyhold or customary tenure, and all other circumstances affecting or relating to the land which shall be included in such enfranchisement, and all advantages to be derived therefrom, and shall make due allowance for the same." The assistant-commissioner, in supposing that he followed the decision of this Court in *Lingwood* v. *Gyde* (1), must have supposed that we meant to expunge from the statute, and he has for the purpose of his decision in this case expunged from the statute, the material words "and all other circumstances affecting or relating to the land," and also the words "and all advantages to be derived therefrom,"—that is, from the enfranchisement, not from the land. Now, the advantage of applying the land for building purposes could not in this case be derived from the enfranchisement until the expiration of the lease, which was granted with the licence of the lord, nor until the leave of the Court of Chancery was obtained to dispense with the restrictions against leasing imposed by the settlement. Our answers, therefore, to the questions propounded for our decision will be as follows:—

---

(1) Law Rep. 2 C. P. 72.

1. I apprehend that, in answering the first question, we are not bound, as the Court of Exchequer (2) and the House of Lords (3) considered themselves to be bound in the case of *Attorney-General* v. *Earl of Sefton*, by the value of the land as it then was. The question there turned upon the construction of a statute which imposed a duty; and that duty was imposed with reference to the actually existing value of the property, and not with reference to any future speculative value. This statute, however, is framed with a totally different view; and we are not at all bound to adopt that rule in ascertaining the improved or improvable value of the

8 Jur N.S. 1296

---

(1) Law Rep. 2 C. P. 72.
(2) 2 H. & C. 362; 32 L. J. (Ex.) 230.
(3) 11 H. L. C. 257; 34 L. J. (Ex.) 98.

land as between the lord and the copyholder. The reasonable fine on admittance to a copyhold tenement ordinarily must not exceed two years' value: the tenant may shew that the value of the land has diminished; and the lord, on the other hand, may shew that it has increased. But the fine is always assessed with reference to the existing state of the land, and without reference to future speculation; and for this reason, because the lord still retains his seignorial rights, and may always impose a fine in respect of any improved value which may take place. In the case of an enfranchisement, however, the lord does not retain that advantage. He is by the statute entitled to receive compensation in respect of facilities for improvements, which was held in *Lingwood* v. *Gyde* (1) to mean the possibility of the lands being applied in the future to purposes more advantageous than those to which they were then applied. But those facilities must be taken into account in conjunction with "all other circumstances affecting or relating to the land." Our answer to the first question, therefore, will be that that part of the lands, with the house and buildings thereon, which is held by Elder, should for the purposes of the enfranchisement be valued as land used and occupied as it now is,—subject to the answers to the third and fourth questions.

2. The answer to the second question will be the same as to the first, subject to the same qualification.

3. Inasmuch as the lease granted to Elder for twenty-one years from the 29th of September, 1860, impowers the tenant to prevent building during the term thereby created, we think it must be taken as an absolute exclusion of the copyholder's power of using the land for building purposes during that time, and must to that extent be taken as a diminution of the facilities for improvement. Our answer to the third question, therefore, will be that the existence of that lease *should* be taken into account in making the valuation for the purposes of the enfranchisement, as being against, and as standing in the way of or preventing facilities for, improvements of the lands.

4. With regard to the fourth question, we are of opinion that, inasmuch as the estate in the lands is, under the will of Edward

---

(1) Law Rep. 2 C. P. 72.

1872

ARDEN v. WILSON.

Carlile, dated the 5th of October, 1830, to be held by the trustees with a power of leasing for a term or terms of years not exceeding twenty-one years, that fact (subject to the operation of the Settled Estates Act, 19 & 20 Vict. c. 120) should be taken into account in making the valuation for the purposes of the enfranchisement, in reduction of the compensation or consideration payable to the lord.

My Brother Keating suggests to me, and I entirely agree with him, that the observations I have made should be taken as a mere comment to explain our meaning, and that our answers to the first and second questions should be in the negative, and to the third and fourth questions in the affirmative.

The substance of our decision is, that the value of the facilities for improvements is to be taken as diminished by difficulties de facto existing in consequence of the state of the title to the land.

With respect to the piece of land coloured brown on the map, which at present has no facility of communication with the public highway, we think that cannot properly be treated as building land until the land through which alone such communication can be had becomes itself capable of being used as building land. That seems to be necessarily involved in our answers to the third and fourth questions.

KEATING, J., concurred.

Judgment accordingly.

Attorneys for appellants: *Willoughby & Cox.*

Attorney for respondent: *Alfred Clark, for Wade & Knocker, Dunmow.*

[IN THE EXCHEQUER CHAMBER.]

1872
June 19.

BRINSMEAD *v.* HARRISON.

Effect of a Judgment in an Action against one of several joint Tortfeasors.

A judgment in an action against one of several joint tortfeasors is a bar to an action against the others for the same cause, although such judgment remains unsatisfied.

10 Ch 187,
190
5 ChD 86
868, 870,

Error upon a judgment for the defendant in the Court of Common Pleas.

Detinue for a pianoforte; Plea, that the act complained of was the joint act of the defendant and one Thompson, and that the plaintiff had recovered judgment in respect of it in an action against Thompson, which judgment still remained in force; Replication, that the judgment was still unsatisfied; Demurrer and joinder: see Law Rep. 6 C. P. 584.

Kelly (*Shaw* with him), for the plaintiff. The question is, whether the judgment recovered against Thompson, not shewn to have been followed by satisfaction, is a bar to this action against a joint wrong-doer. The authorities which were relied upon in the Court below in support of the affirmative of that proposition, were *Brown* v. *Wootton* (1), Com. Dig. *Action* (K. 4), and *King* v. *Hoare*. (2) The dicta there found are, it is submitted, opposed to all the authorities before and since. Chief Baron Comyns cites Yelverton, 68, which refers to *Hitcham* v. *Murcham*. (3) He also cites *Lendall and Pinfold's Case* (4), and *Anonymous* (5); but in each of these cases the plaintiff appears to have received satisfaction against the first wrong-doer. In *Cocke* v. *Jennor* (6), a release to one of two joint trespassers was held to discharge the other, because it is considered as satisfaction in law. Bro. Abr. *Judgment*, 98, and Vin. Abr. *Execution* (F. a.), pl. 4, 5, 6, 7, (G. a.), also shew that it is satisfaction which operates as a bar, and not

---

(1) Cro. Jac. 73; Yelv. 67; Moore, 762.
(2) 13 M. & W. 494.
(3) Noy, 4.
(4) 1 Leon. 19.
(5) 3 Leon. 122.
(6) Hob. 66.

1872

BRINSMEAD *v.* HARRISON.

the mere recovery of the judgment. Rol. Abr. *Execution*, F., is to the same effect. So, in *Foster* v. *Jackson* (1) and *Honey* v. *Rice* (2), stress is laid upon *satisfaction.* In *Drake* v. *Mitchell* (3), Lord Ellenborough says: "I have always understood the principle of transit in rem judicatam to relate only to the particular cause of action in which the judgment is recovered operating as a change of remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action, *until it be made productive in satisfaction to the party.*" So, in *Morris* v. *Robinson* (4), Holroyd, J., says: "Where in trover the full value of the article has been recovered, it has been held that the property is changed by judgment and *satisfaction of the damages.* Unless the full amount is recovered, it would not bar even other actions of trover." In *Watters* v. *Smith* (5), counsel in argument referred to Com. Dig. *Audita Querela* (A.), where it is said that, "if upon a joint trespass by A. and B., there be a recovery against A. in C. B. upon a declaration in London, and against B. in B. R. upon a declaration in another county, and A. *pays the whole,* B. after he is taken shall have an audita querela," and added, "There must be an entire payment of the whole." Upon this Lord Tenterden remarks, "The mere recovery against one will not do." And Taunton, J., in giving judgment (6), says: "A release given to one of two joint contractors enures to the benefit of both; so a judgment *and satisfaction* as to one is a stay of proceedings against the other." In *Marston* v. *Phillips* (7), Cockburn, C.J., says: "The authorities go to this length only, that, if the plaintiff obtains *satisfaction,* either in fact or in law, he shall not be allowed to recover in any other action the damages which he has *already obtained;* he is not to be permitted to obtain the chattel itself after having *received damages in respect of it.*"

[BLACKBURN, J. That is an authority in support of the decision of the Court below on the new assignment. There was only an interlocutory judgment against the joint wrong-doer there.]

---

(1) Hob. 52, at p. 59; 2 Brownl. 311; Moore, 857.

(2) 2 Roll. Rep. 224.

(3) 3 East, 251, at p. 259.

(4) 3 B. & C. 196, at p. 206.

(5) 2 B. & Ad. 889, at p. 892.

(6) 2 B. & Ad. at p. 895.

(7) 9 L. T. (N.S.) 289.

The case of the *Vestry of Bermondsey* v. *Ramsey* (1) is also an authority to shew that the mere recovery of a judgment is no bar. In giving the judgment of the Court, Montague Smith, J., cites the dictum of Lord Ellenborough in *Drake* v. *Mitchell* (2) already referred to. With the exception of the dictum of Parke, B., in *King* v. *Hoare* (3), down to the case of *Buckland* v. *Johnson* (4), in no case has the doctrine of *Brown* v. *Wootton* (5) been upheld. This subject has been well considered in the Supreme Court of the State of New York. In *Livingston* v. *Bishop* (6) it was held that, if separate suits be brought against several defendants for a joint trespass, the plaintiff may recover separately against each, but he can have but one satisfaction, and he may elect de melioribus damnis, and issue his execution therefor against one of them; and the other defendants will be obliged to pay the costs of the suits against them respectively. Kent, C.J., in giving judgment, said: "On looking into the books, with a view to this question, I was surprised to meet with so much contradiction and uncertainty on the subject. The cases are not all capable of being reconciled to each other, and some of them appear to me not reconcilable with reason. It is, however, a proposition that is not controverted, but everywhere admitted, that, for a joint trespass, the plaintiff may sue all the trespassers jointly, or each of them separately, and that each is answerable for the act of all. It would seem to result from this doctrine that a trial and recovery against one trespasser is no bar to a trial and recovery against another. If there can be but one recovery, it is in vain to say that the plaintiff may bring separate suits, for, the cause that happens to be first tried may be used by way of plea puis darrein continuance to defeat the other actions that are in arrear. The more rational rule appears to be that, where you elect to bring separate actions for a joint trespass, you may have separate recoveries, and but one satisfaction; and that the plaintiff may elect de melioribus damnis, and issue his execution accordingly; and that, where he has made his election, he is concluded by it; and that, if he should afterwards proceed against the other defendants, they shall be relieved on payment of their costs. This is agreeable to the rule laid down in *Sir John Heydon's Case.*" (1) "The case of *Brown* v. *Wootton* (2) stands, however, opposed to this view of the subject, and it merits some attention. That was an action of trover for certain goods, and the defendant pleaded a judgment and execution in behalf of the plaintiff against one J. S. for the same goods; and the plea was held good. The Court took a distinction between a demand and a recovery of a thing certain and of a thing uncertain; and they held that, in the first case, as where two are bound jointly and severally in a bond, a recovery and execution against one was no bar against the other without satisfaction; but, where the demand rests only in damages, as, in trespass, a recovery and judgment against one was a bar against the other, for, the uncertain demand is now made certain by the judgment, and the plaintiff shall not resort to the uncertain demand again. In this case, there was a judgment and *execution* in the first case, and so far, therefore, as the opinion of the Court goes to declare that a judgment alone constituted a bar, the opinion was extrajudicial. The principle, however, which the Court went upon, between a demand for a thing certain and a thing uncertain, applied equally to both cases; and yet afterwards, in the case of *Claxton* v. *Swift* (3), which was an action of assumpsit, and, according to the forms of law, equally sounding in damages, the Court held that a recovery without satisfaction against the drawer was no bar to a suit against the indorser of a bill. The principle of the first case may be considered, therefore, as in some degree shaken by this latter decision; for, in the language of the case of *Brown* v. *Wootton* (2), 'the thing uncertain is in both instances made certain by the judgment, and altered and changed into another nature.'" And, after referring to Bro. Abr. *Judgment*, pl. 98, *Morton's Case* (4), *Cocke* v. *Jennor* (5), *Corbet* v. *Barnes* (6), and *Bird* v. *Randall* (7), the learned judge concludes: "I am therefore inclined to question the extent of the decision in *Brown* v. *Wootton* (2), and to hold that a recovery

---

(1) Law Rep. 6 C. P. 247.

(2) 3 East, at p. 259.

(3) 13 M. & W. 494.

(4) 15 C. B. 145; 23 L. J. (C.P.) 204. 18 Jur 775

(5) Cro. Jac. 73; Yelv. 67; Moore, 762.

(6) 1 John. U. S. 290.

---

(1) 11 Co. Rep. 5.

(2) Cro. Jac. 73; Yelv. 67; Moore, 762.

(3) 3 Mod. 86; 2 Show. 494.

(4) Cro. Eliz. 30.

(5) Hob. 66.

(6) W. Jones, 377.

(7) 3 Burr. 1345.

1872

BRINSMEAD *v.* HARRISON.

against one joint trespasser is not alone a bar to a suit against another. There must, at least, be an execution thereon,"—evidently meaning followed by *satisfaction,*—" to bring a case within the facts on which that decision was founded; and that, perhaps, may be deemed an election by the plaintiff de melioribus damnis, and sufficient to conclude him." In a still more recent case in the Supreme Court of the United States, viz. *Lovejoy* v. *Murray* (1), it was held that a judgment against one joint trespasser is no bar to a suit against another for the same trespass; nothing short of *full satisfaction,* or that which the law must consider as such, can make such judgment a bar. *Brown* v. *Wootton* (2) and *King* v. *Hoare* (3) were both cited there. [He also referred to *Jones* v. *Dowle* (4) and *Wilkinson* v. *Verity.* (5)]

Powell, Q.C. (*Joyce* with him), contrà, was not called upon.

KELLY, C.B. In this case a right of action has accrued to the plaintiff in respect of the wrongful detention of a pianoforte. This act was the joint act of two wrong-doers, the defendant and another. The defendant by way of plea alleges that an action was brought for the same cause against the other wrong-doer, and a judgment obtained against her, which remains in full force: and the question is whether that affords any defence to this action. That a judgment and execution, with satisfaction, would be a defence, is not disputed. A long series of authorities has so laid down: but it was doubted at one time whether judgment and execution, without satisfaction, was a bar also. It will be right, therefore, to consider whether this latter is not upon principle a good and valid defence. If it were held not to be a defence, the effect would in the first place be to encourage any number of vexatious actions wherever there happened to be several joint wrong-doers. An unprincipled attorney might be found willing enough to bring an action against each and every of them, and so accumulate a vast amount of useless costs, if judgment against one of them did not operate as a bar to proceedings against the others. The mischief would not even rest there. Judgment having been recovered against one or more of the wrong-doers, and damages assessed, if that judgment afforded no defence, the plaintiff might proceed to trial against another of them, and the second jury might assess a different amount of damages. Which amount is the plaintiff to levy? There are other grounds upon which it would be extremely inconvenient and unjust if a second action could be maintained. But, independently of the mischief which would result from holding the law to be as contended for by Mr. Kelly, let us see how the authorities stand. In the first place, there is no authority whatever,—since the reigns of the Henrys and the Edwards nothing approaching to an authority has been cited,—to shew that such a plea as this would not be a good defence. In the absence, therefore, of authority to the contrary, and upon principle, and also upon what I conceive to be binding authorities in its favour, I come to the conclusion that such a plea as this affords a good defence. In the first place, we have the case of *Brown* v. *Wootton*, as reported in Cro. Jac. 73. There, as here, a joint wrong had been committed by two persons. An action was brought against one, and a judgment obtained, but no satisfaction. A second action was brought against the other wrong-doer for the same cause, and he pleaded, as here, the judgment recovered in the first action. The judgment of the Court is in these terms:—"All the Court held the plea to be good; for, the cause of action being against divers, for which damages uncertain are recoverable, and the plaintiff having judgment against one person for damages certain, that which was uncertain before is reduced in rem judicatam, and to a certainty." And Popham, C.J., adds: "If one hath judgment to recover in trespass against one, and damages are certain, *although he be not satisfied*, yet he shall not have a new action for this trespass. By the same reason, e contrà, if one hath cause of action against two, and obtain judgment against one, he shall not have remedy against the other; and the alleging that he hath the one in execution for this cause is not an answer to the purpose: and the difference betwixt this case and the case of debt upon an obligation against two is, because there every one of them is chargeable and liable to the entire debt, and therefore a recovery against one is no bar against the other until satisfaction." This appears to me to be a satisfactory and binding authority: and the more so because I find that one hundred and fifty years afterwards it is quoted in a book of the highest authority, viz. Comyns's Digest, which alone would make it a satisfactory guide for us upon the present occasion. But it does not stop there, for, I find *Brown* v *Wootton* (1) and all the older cases referred to in *King* v. *Hoare* (2), where the question was fully and elaborately considered in the Court of Exchequer, and a judgment was pronounced by one of the most learned judges that ever sat in Westminster Hall. It is unnecessary to go through the enlightened and elaborate reasoning of that very learned person. Suffice it to say that he deals with the whole law upon the subject; and the result is thus summed up in the marginal note of the report of that case,—a judgment in an action against one of two joint tort-feasors is a bar to an action against the other for the same cause. There being, then, this series of authorities, satisfactory of themselves, and having the sanction and approval of Chief Baron Comyns and Lord Wensleydale, notwithstanding the respect we entertain for the opinions and decisions of the American Courts, where a different view of the law seems to be entertained, I think we are bound to follow those of our own Courts, and to hold that, upon principle as well as upon authority, this plea is a good answer to the action, and consequently that the defendant is entitled to judgment.

---

(1) 3 Wallace, 1.

(2) Cro. Jac. 73; Yelv. 67; Moore, 762.

(3) 13 M. & W. 494.

(4) 9 M. & W. 19.

(5) Law Rep. 6 C. P. 206

BLACKBURN, J. I am of the same opinion. The question raised upon this record is whether the claim of the plaintiff against two joint wrong-doers is put an end to by a judgment recovered in an action against one of them without shewing that that judgment has been satisfied. I apprehend that it is, on the ground that transit in rem judicatam, or upon the general principle of convenience which is expressed in the maxim "Interest reipublicæ ut sit finis litium." Is it for the general interest that, having once established and made certain his right by having obtained a judgment against one of several joint wrong-doers, a plaintiff should be allowed to bring a multiplicity of actions in respect of the same wrong? I apprehend it is not; and that, having established his right against one, the recovery in that action is a bar to any further proceedings against the others. It is unnecessary to go into the earlier cases. But, in the reign of James I, it was distinctly decided in *Brown* v. *Wootton* (1) that a judgment recovered in trover might be pleaded in bar to a second action against a different person for the same cause, without averring satisfaction; "for," say the Court, "the cause of action being against divers, for which damages uncertain are recoverable, and the plaintiff having judgment against one person for damages certain, that which was uncertain before is reduced in rem judicatam, and to a certainty." Whether that which is added by Popham, C.J., is right or wrong, there is a distinct decision of the Court of Queen's Bench: and in the next century that great lawyer, Chief Baron Comyns, gives the high authority of his sanction to it. In more modern times, Baron Parke, probably the most acute and accomplished lawyer this country ever saw, holds the same doctrine in *King* v. *Hoare*. (2) I find no dictum of authority and no decision the other way. If this were res integra, I should have considered the American cases referred to entitled to great respect. But, for the reason given by the Court in *Brown* v. *Wootton* (1), which works no injustice, and which has been acted upon for centuries, although no decision of a Court of error has been pronounced upon it, I think we are bound, even sitting in a Court of error, to decide in conformity with it. I observe that the Court of Common Pleas, in their judgment upon the demurrer to the new assignment, which is not now before us, held that by the recovery in the first action without satisfaction the property in the chattel did not pass. I should be inclined to agree to this, but it is unnecessary to express an opinion upon it.

---

(1) Cro. Jac. 73; Yelv. 67; Moore, 762. (2) 13 M. & W. 494.

5 CLD 871

MELLOR, J., and CLEASBY, B., concurred.

LUSH, J. I entirely agree with the rest of the Court. I think the matter is concluded by authority, the law as laid down in *Brown* v. *Wootton* (1), in the time of James I., having been recognized since by the high authorities referred to. If the reasons were not satisfactory to my mind, I might be induced to go along with the American decisions to which our attention has been called. But, after so long a series of decisions in our own Courts,

---

(1) Cro. Jac. 73. Yelv. 67; Moore, 762.

(2) 13 M. & W. 494.

1872

BRINSMEAD v. HARRISON.

5 Ch D 871

I do not think we ought to yield to the opinions there expressed, whether they do or do not commend themselves to our judgment. The judges who decided those American cases seem to have thought that, by holding that recovery against one of two wrong-doers was a bar to an action against the other, they would be deciding that the property in the chattel passed by the recovery; but I do not think that by any means follows; and, as at present advised, I am prepared to adhere to the judgment of the Court below upon both points.

Judgment affirmed.

Attorney for plaintiff: *John Berridge.*
Attorneys for defendant: *Blachford & Riches.*

July 5.

THE BRECON MARKETS COMPANY *v.* THE NEATH AND BRECON RAILWAY COMPANY.

Toll Traverse—Brecon Markets Act, 1862 (25 *&* 26 *Vict. c. clxxxvi*)*—Toll for Goods carried by Railway.*

Goods carried by a railway company upon their railway, or to their railway station, entirely upon land belonging to them, and not upon any highway or in the enjoyment of any easement or other right reserved by the former owners of the land or those under whom they claim, cannot be the subject of a claim to a toll thorough or toll traverse arising either by prescription or grant.

Distinction between "toll thorough" and "toll traverse."

The Brecon Markets Act, 1862 (25 & 26 Vict. c. clxxxvi), vested in the market company certain tolls which had been immemorially received by the corporation of Brecon for cattle, goods, and carriages passing to, through, or from the borough. A railway company, under the sanction of an Act of Parliament passed in the same session, acquired land (not being a highway) on which they constructed a railway and station within the borough of Brecon, whence passengers, goods, and cattle were conveyed by other lines of railway to other places beyond the limits of the borough. The rights of the corporation and of the Market Company were expressly reserved by the Railway Act, but there was no provision either in that or in the Railway Act enabling them to levy tolls on the railway:—

Held, that the Brecon Market Company were not entitled to toll in respect of cattle, goods, or carriages passing along the railway.

Whether they could claim toll on cattle or goods finding their way from the railway station to the streets of the borough,—*quære?*

Affd in Ex Ch. L.R. 8 C.P. 555.

SPECIAL CASE stated pursuant to a judge's order.

1. The plaintiffs are incorporated by the Brecon Markets Act, 1862 (25 & 26 Vict. c. clxxxvi), hereinafter called the Market Act.

1872

BRECON MARKETS Co. *v.* NEATH AND BRECON RAILWAY Co.

2. The defendants are incorporated and regulated by the Dulas Valley Mineral Railway Act, 1862 (25 & 26 Vict. c. cxciii) and by the Neath and Brecon Railway Act, 1863 (26 & 27 Vict. c. cxxx), hereinafter called the Railway Acts. The defendants' principal office is in London.

3. The most material parts of both Acts were set out in the appendix; but either party might refer to any of the said Acts and the Acts incorporated with such Acts respectively.

4. The plaintiffs claim in this action payments described as "drift-tolls" and "dues" in the Market Act. The pleadings and particulars (which were to be amended on either side as the Court might think fit) were set out in the appendix.

5. The following items of the 4th schedule of the Markets Act describe the tolls claimed in this action:—

The Fourth Schedule.

"*Drift Tolls and Dues and Fair Tolls payable within the Borough.*

	s.	*d.*
"For every score of horned cattle driven through the borough . . .	0	10
"For every score of sheep or swine, ditto	0	5
"And so on in proportion for any number of horned cattle, &c., less than, a score.		
"For every wagon or carriage with four wheels belonging to any person not residing in the county of Brecon passing to, through, or from the borough	1	0
"For every wagon belonging to any person residing in the county of Brecon, passing through the borough to any place in any other county	1	0
"For every wagon belonging to any person not resident in the county, coming to the borough with hops, leather, or other articles, to be sold	1	0
"For every wagon bringing stone-coal	0	6

The tolls mentioned in the 4th schedule to the Market Act are tolls formerly due and payable to the mayor, aldermen, and burgesses of the borough of Brecon, as mentioned in the Market Act, and transferred to the plaintiffs by the Market Act. (1)

---

(1) Sect. 79 of the Market Act, 1862, enacts that "the company from time to time, as representing the corporation, may demand and take, in respect of the several matters in that behalf specified in the 4th schedule to this Act annexed, any sums not exceeding the several drift tolls and dues, including fair tolls, specified in that schedule; and the drift tolls and dues may be demanded and taken by and shall be payable and paid to the company and their officers in all respects as they have heretofore been demanded

6. The defendants, under the powers of the Railway Acts, constructed the railway mentioned therein; and the greater part of such railway has been opened for passenger traffic since the 3rd of June, 1867. It joins the Brecon and Merthyr Tydfil railway (hereinafter called the Merthyr railway) belonging to the Brecon and Merthyr Tydfil Junction Railway Company (hereinafter called the Merthyr Tydfil railway) by a junction with it within the borough of Brecon, referred to in the Market Act, and therein and hereinafter called the borough. The defendants have a station within the borough called the Brecon station. The Vale of Neath railway, belonging to the Great Northern Railway Company, forms a junction with the defendants' railway at Neath, in the county of Glamorgan. The defendants' railway, and with it the Vale of Neath railway, by means of the junction at Neath, forms by means of the junction in the borough a continuous railway system with the Merthyr railway, which continues on from such junction within the borough to various stations on that railway outside the borough. The Hereford, Hay, and Brecon Railway Company and the Mid-Wales Railway Company exercise running powers and run trains into the borough over the Merthyr railway. The said junction has not yet been opened for public passenger traffic, as that has been restrained by injunction at the instance of the plaintiffs; but it has been and is used for the transmission of goods and cattle traffic.

7. The mode of conducting the traffic on the several railways at present and during the period referred to in the particulars of demand is as follows:—

8. The defendants at their various stations on their railway outside the borough, some of which are within the county of Brecon and others beyond that county, book passengers to the borough and convey them in their carriages in trains in the ordinary manner to their station in the borough, but not beyond it.

9. The Great Western Railway Company book passengers from Swansea to the borough, and from other stations belonging to

---

and taken by and payable and paid to the corporation and their officers; and the company shall have the same right and title therein and thereto as immediately before the passing of this Act the corporation had therein and thereto."

them to Neath, where passengers re-book to the borough. These passengers are conveyed by the Great Western Railway Company in their carriages to the junction at Neath; and such passengers then leave those carriages and are conveyed by the defendants in their carriages as their other passengers are, to their station in the borough, but not beyond. The fares from Swansea to the borough, and from other stations to Neath, as the case may be, are received by the Great Western Railway Company at the time of the booking of the passengers.

10. The defendants also at their station within the borough book passengers to Swansea, outside the borough, and to Neath and other stations on their own railway, also outside the borough. These passengers are conveyed by the defendants in their carriages in trains in the ordinary manner to the stations on their railway; or, if for any station on the Vale of Neath railway, such passengers change from the defendants' carriages at Neath Junction, and are then conveyed by the Great Western Railway Company in their carriages to the destination of the passengers. The fares from Brecon to Swansea and to the other stations on the defendants' railway are received by the defendants at the time of the booking of the passengers.

11. The passenger carriages so used by the defendants are ordinary four-wheeled railway carriages drawn in a train by a six-wheeled engine with a tender, or by a six or eight-wheeled tank-engine. The same carriages frequently pass from and to the station in the borough in the above manner several times a day.

12. The defendants also, at various stations on their railway outside the borough, some of which are within the county of Brecon and others beyond that county, receive horned cattle, sheep, and swine consigned to different persons at various stations both within and beyond the county of Brecon on the Merthyr railway and other railways communicating with it. Such horned cattle, sheep, and swine are carried by the defendants in their trucks beyond the junction in the borough to the station of the Merthyr Railway Company, also in the borough, and are there delivered to the Merthyr Railway Company and other companies in the wagons or trucks in which they have been brought there; and the Merthyr Railway Company or other companies convey them from such

station in the same trucks to their respective destinations, and there deliver them to the consignees.

13. The defendants use the ordinary four-wheeled cattle-wagons or trucks, which are drawn in trains by the usual engine and tender. The tolls in these cases for the whole journey are received by the defendants from the consignors; but cases do occur where the carriage is not pre-paid. This mode of conveyance has affected the passage of such animals by other means through the borough, which before the construction of the defendants' railway passed in large droves and great number.

14. The defendants also at the various stations on their railway outside the borough, some of which are within and others beyond the county of Brecon, receive stone-coal (which expression is used in this case in the same sense as in the Market Act), lime, and other articles consigned to different merchants and persons at the Brecon station and the various stations both within and beyond the county of Brecon on the Merthyr railway and other railways in connection therewith. Such of the stone-coal, lime, and other articles as are consigned to different persons and merchants in the borough are delivered there by the defendants to the consignees within the borough, and such as are consigned to different persons at stations beyond Brecon are carried by the defendants beyond the junction to the goods station of the Merthyr Railway Company in the borough, and there delivered to the Merthyr Railway Company and other companies in the wagons or trucks in which they have been brought there; and such last-mentioned railway company carry them therefrom in the same wagons or trucks to their respective destinations, and there deliver them to the consignees. The tolls in these cases for the whole journey are received by the defendants from the consignors, when it is pre-paid. The defendants also bring into the borough for their own use, and keep at the Brecon station, quantities of stone-coal.

15. The Great Western Railway Company also, at the various stations on their railway, receive stone and other coal, lime, and other articles consigned to different merchants and persons at the defendants' station in the borough, and at various stations both within and beyond the county of Brecon on the Merthyr Railway Company's and other railways in connection with it; and such stone-

coal, lime, and other articles are conveyed by the defendants to the junction at Neath, and are there delivered to the defendants in the wagons or trucks in which they have been brought there; and the defendants convey them in such trains and wagons or trucks in the manner mentioned in the next preceding paragraph, according to their destination. The tolls in these cases for the whole journey are received by the Great Western Railway Company from the consignors, when pre-paid.

16. With reference to the last two preceding paragraphs, the defendants and the Great Western Railway Company use the ordinary four-wheeled railway wagons or trucks; and they are drawn in trains by the usual engine and tender or tank-engine.

17. The fares or tolls so received as aforesaid for a through journey on more than one railway are apportioned at the railway clearing-house, according to the system there established by law.

18. In some instances, the passenger carriages, cattle or goods wagons or trucks used for the purpose above mentioned belong to the defendants; in others, they belong to the Great Western Railway Company; in others, to persons or companies residing within the county of Brecon; in other cases, to persons or companies residing beyond the limits of the said county. The coal-wagons frequently belong to the coal-masters who raise the coals.

19. In many instances, such passenger carriages, cattle and goods wagons or trucks belonging to the defendants or used by them pass into, through, or from the borough empty once or several times a day.

20. The Court was to be at liberty to draw inferences of fact as they might think fit.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover any and what tolls or payments under the various circumstances above described.

The amounts, if any, were to be ascertained on the principle settled by the Court, as arranged between the parties; and judgment was to be entered up according to the opinion of the Court either for the plaintiffs for such amount, with costs (including the costs of ascertaining such amount), or for the defendants, with costs.

Dowdeswell, Q.C., for the plaintiffs. The tolls in question were immemorially payable to the corporation of Brecon, as appears from the recitals in the Market Acts, 1 Vict. c. xii, and 25 & 26 Vict. c. clxxxvi, for cattle or goods coming to or passing through the borough.

[Willes, J. This is a claim of a toll traverse, like the 1*d.* toll for passing through Rochester, which was granted to the corporation as a reward for assisting the embarkation of warriors for the Holy War.]

Sir G. Honyman, Q.C. (*J. O. Griffits* with him), were called upon for the defendants. Before the passing of the Act of 1862, no tolls had been levied for anything carried through the borough on the railways. The question is whether that Act enables the corporation to claim tolls. The claim is of a toll traverse. The distinction between toll thorough and toll traverse is pointed out in Com. Dig. *Toll* (C), (D. a.) To support a claim to the former, a consideration must be alleged, as, the repair of the highway, &c.: *Brett* v. *Beales* (1): in the case of the latter, which is a sum demanded for passage over what was at the time of granting the toll the private soil of another, a consideration is necessarily implied. Here, the toll is claimed in respect of things passing over soil which has been granted to the railway company.

[*Dowdeswell, Q.C.,* referred to s. 82 of the original Brecon Market Act, 1 Vict. c. xii. (2)]

[Willes, J. That is consistent with this being either toll thorough or toll traverse.]

The railway company acquired the land upon which their railway is constructed under the powers of an Act (25 & 26 Vict. c. cxciii) which passed on the same day that the Market Act, 1862, was passed. The legislature never could have intended to use words which primâ facie imply a passing over an ordinary road as applying to the railway. A claim to tolls like this was made by the burgesses of Linlithgow against the Edinburgh and Glasgow Railway Company for the passage of goods by their railway from Edinburgh to Glasgow through the liberties of Linlithgow, but without effect: *Edinburgh and Glasgow Ry. Co.* v. *Linlithgow.* (1) This claim, like the claim there, is not for passing over the land of another, but for making use of the land which is the exclusive property of the defendants, and is exclusively in their possession. It is true that the Act of Parliament in that case gave the borough a compensation for certain bridge-tolls: so, here, the advantage of having railway communication brought to Brecon might have been considered by the legislature more than a compensation for the loss of these tolls.

---

(1) 10 B. & C. 508.

(2) Which enacted that "nothing in this Act contained shall extend, &c., to take away, diminish, &c., the right of the mayor, &c., to hold fairs, or the right of the mayor, &c., to any rents, tolls, duties, or profits whatsoever heretofore paid to them for or in respect of any cattle or horses sold at any such fairs, or to any rents, tolls, duties, or profits whatsoever heretofore paid to them for any cattle, &c., driven through the borough, or for any wagon, cart, or carriage passing to, through, or from the said borough," &c.

Dowdeswell, Q.C., in reply. This is a claim for toll traverse. In Ellis's Introduction to Domesday, vol. i. p. 256, it is said, "*Tol, Thol*, or *Theloneum*, in the language of the Domesday survey, was not merely the liberty of buying and selling, or keeping a market; it also signified the customary dues or rents paid to the lord of a manor for his profits of the fair or market, as well as *a tribute or custom for passage*."

[WILLES, J. Toll traverse is somewhat obscure in its origin and definition. It is clear that a man may have by grant or prescription toll for passing over his land. That which is uncertain seems to be this,—being entitled to toll, whether on a highway or not, if he grants away the land without impressing upon it the character of a highway, can he still be entitled to toll for passing over it whilst in the hands of his grantee?]

That question seems never to have been suggested. The claim has always been by the lord for coming to his manor, or the like: see *Crispe* v. *Belwood* (2); *Truman* v. *Walgham* (3); *Smith* v. *Shepherd* (4); *Colton* v. *Smith* (5); *Pelham* v. *Pickersgill.* (6)

[WILLES, J. That may be, so long as he retains the land in his own hands. The presumption is that he had granted the use of the land to the public in consideration of the toll.]

The lord having a right of toll on all things coming to his ville,

---

(1) 1 Macq. 1; 3 Macq. 691.

(2) 3 Lev. 424.

(3) 2 Wils. 296.

(4) Cro. Eliz. 710.

(5) 1 Cowp. 47.

(6) 1 T. R. 660.

1872

BRECON MARKETS CO. *v.* NEATH AND BRECON RAILWAY CO.

he may grant the land and retain the toll; being a franchise, the toll would not pass by the grant. There can be no valid grant of a toll on a highway: *Foreman* v. *Free Fishers of Whitstable.* (1)

[WILLES, J. Unless co-eval with the grant of the way. That was a claim for anchorage on an arm of the sea between high and low water mark, in consideration of buoys, &c., provided for the use of vessels.]

Here the lords, the corporation, were owners of the soil, there being no public way over it. In *Rickards* v. *Bennett* (2), in trespass, the lord of a manor justified the taking of a cheese under a claim for a toll upon "all goods bought and delivered, or bought elsewhere and brought into and delivered, in a town within the manor, which from time immemorial had been parcel of the manor;" and it was held to be a good claim of toll traverse.

[WILLES, J. That was toll upon an importation.]

So is this. Bayley, J., there says (3): "This toll may fairly be presumed to have been granted at a time when the lord of the manor was also owner of the soil, in return for the dedication of a part of that soil to the public. Upon this view of the case, it falls exactly within *Crispe* v. *Belwood* (4), *Pelham* v. *Pickersgill* (5), and *Colton* v. *Smith*." (6) And Best, J., said (7): "The distinction between the two descriptions of toll is well given in a note to Fitz. N. B. 227. 'Toll thorough is in the highway, but toll traverse is for passing over another's ground.' In the latter case, the use of the soil is a sufficient consideration for the toll, and it is not necessary to state any other in support of a claim to it. But, in the former, it is in a highway, that is, where the proprietor (8) had a right of passage before the grant of toll; and therefore the claimant must shew that something is done by him beneficial to the person against whom he makes the claim. This distinction is also taken by Lord Chief Justice Willes in the case of *Mayor of Nottingham* v. *Lambert*." (9) It is impossible to distinguish that case from the present. The cases of *Mayor of*

---

(1) Law Rep. 4 H. L. 266.
(2) 1 B. & C. 223.
(3) 1 B. & C. at p. 233.
(4) 3 Lev. 424.
(5) 1 T. R. 660.
(6) 1 Cowp. 47.
(7) 1 B. & C. at p. 434.
(8) "Public"?
(9) Willes, 111.

1872

BRECON MARKETS CO. *v.* NEATH AND BRECON RAILWAY CO.

London v. *Hunt* (1), *Lord Falmouth* v. *George* (2), and *Jenkins* v. *Harvey* (3), are also distinct authorities in favour of this claim. Every presumption ought to be made in support of a toll which has been immemorially received. These tolls are recited to have been immemorial tolls, in the first Brecon Market Act, 1 & 2 Vict. c. xii, s. 82; and the Act of 1862, s. 79, transfers them as subsisting tolls to the now plaintiffs. As to the coal brought to the company's station for consumption there, the plaintiffs are clearly entitled to the import toll on that: *Great Western Ry. Co.* v. *Rous.* (4) In *Edinburgh and Glasgow Ry. Co.* v. *Linlithgow* (5), the toll for the goods brought into the borough was not disputed; but only the toll for goods carried through the borough.

[WILLES, J. A similar distinction is pointed out by that great lawyer and accurate reasoner, Holroyd, J., in *Rickards* v. *Bennett* (6): "It is not," he says, "a claim for toll for the privilege of going along a highway, but a claim by prescription by a lord of a manor for toll upon goods sold and brought into the manor for delivery. It is not a claim for passing through the manor, but for bringing goods into it, and delivering them there."]

It never could have been the intention of the legislature to grant such a toll as was claimed in the *Linlithgow Case.* (5) There were no means of enforcing it. There can be no such difficulty here; Brecon being the terminus of the defendants' line. The mode of transit does not affect the question of right to the toll: *Mayor of Carlisle* v. *Wilson.* (7) Under the Lancaster and Carlisle Railway Act (9 & 10 Vict. c. cclvii.) express provision is made (in s. 15) that tolls shall not be paid in respect of traffic on the railway.

Cur. adv. vult.

July 5. The judgment of the Court (Willes and Keating, JJ.,) was delivered by

WILLES, J. This case raises a question which, chiefly upon the ground of its general importance, we took time to consider, viz. whether the carriage of goods by a railway company upon their

---

(1) 3 Lev. 37.
(2) 5 Bing. 286.
(3) 2 C. M. & R. 393.
(4) Law Rep. 4 H. L. 650.
(5) 1 Macq. 1; 3 Macq. 691.
(6) 1 B. & C. at p. 233.
(7) 5 East, 2.

1872

BRECON MARKETS CO. v. NEATH AND BRECON RAILWAY CO.

railway, or to their railway station, entirely upon land belonging to the railway company, and not upon any highway, or in the enjoyment of any easement or other right reserved by the former owners of the land or those under whom they claim, can be subject to a toll thorough or toll traverse arising by prescription or grant; for, the tolls claimed are admitted to be of that description, and are not tolls created by the statute under which the company was incorporated, and by which it appears they are invested with the rights previously existing in the corporation of Brecon, for the purposes mentioned in the Act.

We are of opinion that no such toll can be imposed. The enjoyment of the railway company is a proprietary one of their own land purchased without any reservation as to the use thereof by the sellers or by the person or persons from whom they bought. It is not the use of the land or easement of another, nor the enjoyment of any benefit directly or indirectly conferred upon them by another.

There are cases, doubtless, in which tolls are sustained in respect of some advantage of which each member of the public may avail himself if he thinks proper, and which must be paid in respect of the opportunity and capacity of enjoyment in the individual and the general public benefit, whether there be any actual enjoyment by the particular individual or not; as, for instance, the payment or render of the best fish by each boat frequenting a particular cove, to the owner of land who provided there a rope and windlass to assist fishing boats in landing in rough weather,—*Lord Falmouth* v. *George* (1),—or anchorage, in respect of the provision of buoys, a landing place, or other conveniences for the public,—*Foreman* v. *Free Fishers of Whitstable* (2),—or metage, in respect of providing for the measurement or weighing of goods brought into a port which there was an obligation to maintain, or other port dues of a like kind: *Jenkins* v. *Harvey*. (3) The rule applicable in such cases in respect of the obligation to maintain ports or other conveniences for public use, that an individual frequenting the place, and having the power of taking advantage of the benefit provided, shall pay the due whether he takes advantage of the benefit or not, has no application to the case of toll for passing upon land.

---

(1) 5 Bing. 286.

(2) Law Rep. 4 H. L. 266.

(3) 2 C. M. & R. 393.

Tolls for passing upon land are granted by the Crown in respect of a consideration to be enjoyed by the persons who are to pay them; and they cannot be effectually granted without such a consideration, or so as to extend or be taken beyond the place in which such consideration arises. They consist of two sorts, toll thorough, and toll traverse. Toll thorough may be taken upon land not belonging to the grantee, and consequently no consideration can be implied for such grant. It is ordinarily taken upon a highway, and is granted to some one who undertakes some public work for the benefit of those who use the highway, as, for instance, in making the road or keeping it in order and repair for the use of the passers by; and it can only be taken in the way or ways to which such obligation applies. Therefore, if a person were entitled to a toll thorough in a town, in consideration of keeping certain streets in order, the toll would apply only to such streets; and persons using other streets could not be made subject to the toll: *Truman* v. *Walgham* (1); *Brett* v. *Beales.* (2)

Accordingly, it was not argued that the claim in question could be maintained as a toll thorough, because nothing is done by the corporation or by the plaintiffs towards the repair of the railway, or otherwise to aid or assist the traffic of the railway company. It was, however, insisted that the claim might be maintained as for a toll traverse, which consists of a toll granted and claimed for going over the land of the grantee. A toll traverse is said to differ from a toll thorough in this, that no consideration for it need be averred. This does not, however, mean that there need be no consideration for it; it merely expresses that, as there can be no toll traverse except in respect of going over the land of the grantee, the consideration of using the land is implied from the character of the toll, and need not be further averred than by stating that it is a toll traverse. The consideration is the giving up the land of the grantee. This does not make it necessary that the grantee should actually retain the soil in the land. It is enough that he should have the land at the time of the grant, and allow the use of it to the persons who are to pay the toll; and it is not necessary

(1) 2 Wils. 296, at p. 299.

(2) 10 B. & C. 508.

that he should be the lord of a manor, though such grants have usually been made to lords of manors. Whilst the grantee has the land, he is entitled to the toll in respect of the use of it. If he part with the land, he may still retain the right to the toll; as in the case of *Pelham* v. *Pickersgill* (1), where a toll traverse over a public road was sustained upon the footing that the public road had been originally set out on the grantee's land in consideration of payment of the toll, and that the grant of the land was subject to the public right of way to which the toll attached, and which secured to the persons charged with the toll that user which was the consideration for it. The same law was acted upon in *Crispe* v. *Belwood* (2), *Colton* v. *Smith* (3), and in the case so much relied upon for the plaintiffs, of *Rickards* v. *Bennett* (4), more fully reported in 2 D. & R. 389. In all these cases the grantee either reserved the land or by dedicating it to the public as a highway secured to persons who used it the consideration for which the toll was granted. Some of the expressions attributed to the Court in the report of *Rickards* v. *Bennett* in 1 B. & C. 223 were relied upon as shewing that it was sufficient that the grantee should be possessed of the land at the time of the grant, without regard to his having subsequently parted with it by a general conveyance without granting a public right which remained impressed upon the land and secured the use of it to the public, and without any exception or reservation in the grant (if such could legally exist apart from a public right) enabling the grantor to allow of such use and so to earn the toll. It will be found, however, upon examining the case of *Rickards* v. *Bennett* (4) and the authorities upon which it was founded, that no such opinion was there held. The question arose upon the validity of a plea stating that the goods came upon the manor, which was considered to mean that they came upon land which continued to be the plaintiff's, or upon which he had reserved a right to have them landed so as to earn the toll.

We are not dealing with a case of prescriptive taking of tolls in the places in question, to sustain which any such reservation could be implied. This land is not the plaintiffs'. If they were not the original owners of the land, they can have no right there. If they were the original owners, they have parted with it without devoting it as a highway or otherwise to the use of the public or other persons using it. It is, at best, the simple case, then, of a landowner entitled to toll traverse parting with his land out and out, without having reserved any right therein. According to the argument for the plaintiffs, after such a grant without reservation the grantor could sue the grantee for doing upon his own land any of the things for which a toll could be claimed if it remained the property of the grantor. This would be in derogation of the right of possession granted, and could only be secured by reservation; and there is no reservation. So much for use by the grantee: but, suppose a third person were to enter without leave from the grantee, he would, according to the argument, have to pay damages for the trespass to the grantee, and toll also to the grantor; and if the toll were (as a toll may be) not fixed, but of a reasonable amount,—*Corporation of Stamford* v. *Lambert* (1),—he must pay twice over for the supposed valuable consideration.

---

(1) 1 T. R. 660.
(2) 3 Lev. 424.
(3) 1 Cowp. 47.
(4) 1 B. & C. 223.

No authority was cited to sustain this strange conclusion; but reference was made to the numerous cases in which a right in gross (separate from the proprietary right) has been held not to pass with the land over which it was to be exercised; and it was said that, as such a right does not pass to the grantee, therefore it must remain in the grantor, and may be exercised by him in spite of his grant of the land. One of these cases will suffice for an illustration, viz. that of a free warren, which may exist either in a man's own land or in the land of another, and which, if in gross, does not pass by the grant of the land. But, suppose a man having free warren in gross in his own land grants the land without reservation to another, what is the result? May he enter and disturb his grantee? The case of *Morris* v. *Dimes* (2) furnishes no authority upon this question; for, it only shews that the grantee takes nothing in the warren, and so cannot enforce it against a third person. The answer is to be found in Brooke's Abridgment, *Grauntes*, pl. 144, where the better opinion is said to be that, if a person having a right of warren in gross in his own land demises for years without mentioning the warren, the lessor cannot have the warren, because it is not reserved, and the lessee shall not have

---

(1) 1 C. & J. 57, 400.

(2) 1 A. & E. 654.

1872

BRECON MARKETS CO. v. NEATH AND BRECON RAILWAY CO.

it, because it is not granted, and such warren in gross is suspended during the term. And so, in the present case, the corporation, if they were originally owners of the land, have in like manner parted with it. There is no evidence of any reservation, express or implied; and the railway company, the present owners of it, may use it for all lawful purposes, including those for which toll is claimed.

We are well impressed with the importance of maintaining rights founded upon ancient usage, and of maintaining any right that has been long enjoyed in fact, to the extent to which such usage points out a possible legal origin. Such a consideration is, however, inadmissible in the present case, because, allowing the usage to be just, and assuming toll traverse established through the borough, such toll traverse has for the reasons mentioned been parted with, or at least suspended until the land finds its way back to the corporation or their statutory grantees.

Whether upon goods finding their way from the land of the railway company into the streets of Brecon a toll will become payable, has not been argued; and the decision of that question is beside the present litigation. Our judgment affects tolls upon goods which have not left the land of the railway company.

Judgment for the defendants.

Attorneys for plaintiffs: *Wilkins, Blyth, & Marsland,* for *R. C. Cobb, Brecon.*

Attorneys for defendants: *Dean & Taylor.*

1872
May 29.

DE MATTOS *v.* SAUNDERS.

Marine Insurance—Partial Loss—Stranding—Bankrupt suing as Trustee—Set-off of unpaid Premiums—12 & 13 *Vict. c.* 106, *s.* 171—24 & 25 *Vict. c.* 134 *ss.* 192, 197.

5 CPD 38
5 QBD 542

A cargo of salt, worth together with pre-paid freight about 1900*l.*, was insured from Liverpool to Calcutta, the policy containing the usual memorandum warranting " corn, fish, salt, &c., free from average unless general or the ship be stranded." Having encountered bad weather, lost both her anchors, and had her masts cut away, the ship was taken in tow by salvors and placed on a bank out of the ordinary course of the voyage, where she lay on her port side for several tides, and sustained considerable further injury. The salt was landed in a damaged state, and the ship repaired, though at an expense which exceeded her value when repaired. About one-fifth of the salt might have been made saleable, but would have realized no profit.

Suits were instituted by the salvors in the Admiralty Court, and the salt sold under a decree, the entire proceeds being absorbed by the costs:—

Held, that there was a partial loss of the salt, but not a total loss, the seizure and sale under the decree of the Admiralty Court not being a natural or necessary consequence of a peril insured against; and that there was a stranding within the meaning of the memorandum.

The assured had subsequently to the date of the policy executed a deed of inspectorship under the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, s. 192, and was suing on behalf of third persons who had made advances upon the shipping documents:—

Held, that the plaintiff was entitled to recover, and that the underwriters were not entitled to set off the amount of a debt due from the plaintiff to them under the mutual credit clause (s. 171) of 12 & 13 Vict. c. 106.

This was an action for a total loss on a policy effected upon a cargo of salt on board the *Margaret Quale* from Liverpool to Calcutta, and the increased value thereof by pre-payment of freight. The policy contained the usual memorandum,—" corn, fish, salt, &c., being warranted free from average unless general or the ship should be stranded." The defendant pleaded, 1. that the salt was not totally lost; 2. that the freight was not prepaid; 3. an equitable plea of mutual credit, alleging that the plaintiff duly executed a deed for the benefit of his creditors under the Bankruptcy Act, 1861, and that at the time of making such deed he was indebted to the defendant, and that at the time of the defendant giving the plaintiff credit he had no notice of any act of bankruptcy committed by the plaintiff. Issue thereon.

The cause came on for trial before Erle, C.J., at the London sittings after Michaelmas Term, 1865, when a verdict was found for the plaintiff for the amount claimed, subject to a special case:—

1. The plaintiff is a merchant carrying on business in London,

and was until lately engaged in shipping coals and salt to India and elsewhere.

2. On the 25th of September, 1863, the plaintiff entered into a charterparty with one W. Quale, the owner of the *Margaret Quale*, and thereby chartered that vessel to proceed from Liverpool to Calcutta with a cargo of salt at 21*s*. per ton, to be paid, one third at three months and one third at six months from the final sailing of the vessel, less 5 per cent. for insurance, and the remainder on right delivery of the cargo, in cash.

3. The *Margaret Quale* was loaded with 1059 tons of stoved salt and 359½ tons of butter salt, for which on the 29th of October, 1863, the master signed a bill of lading, upon which was written the following memorandum signed by the owner,—“ Received in advance of the within freight, 992*l*. 19*s*., being two thirds payable as per charterparty.”

4. On the 29th of October, the plaintiff, in accordance with the terms of the charterparty, gave to the owner of the ship two acceptances, one at three months for one third, and the other at six months for one third of the freight, making together 992*l*. 19*s*. These acceptances were dishonoured.

5. The following is the invoice made out by the plaintiff, shewing the cost of the cargo and the increased value thereof by the pre-payment of freight :—

“ Invoice of a cargo of salt shipped at Liverpool for Calcutta per *Margaret Quale*, and consigned to Messrs. John Ogle & Co. there for sale on account and risk of the undersigned. Returns to Messrs. Mollwo, March, & Co.

				£.	s.	d.
“ 1059 tons stoved salt, 12*s*. per ton				635	8	0
“ 359½ tons butter salt, 10*s*. 6*d*. per ton				188	14	9
“ 100 dozen mats, at 4*s*. 6*d*. per dozen				22	10	0
“ Customs, 1*s*. 6*d*. Bill of lading, 2*s*. 6*d*.				0	4	0
				846	16	9
“ Freight @ 21*s*. per ton	1489	8	6			
“ Less, payable in Calcutta	496	9	6			
				992	19	0
“ Insurance, 980*l*. @ 80*s*.%	39	4	0			
“ Policy duty	2	5	0			
				41	9	0
				1881	4	9
“ Commission, 2½% ..				47	0	7
“ London, 30th October, 1863.				£1928	5	4

(Signed) “ W. N. De Mattos.”

1872

DE MATTOS
v.
SAUNDERS.

6. On the 30th of October, 1863, the plaintiff effected the policy sued on, upon 1418 tons of salt, and increased value thereof by pre-payment of freight, valued at 1700*l.*

7. The defendant underwrote the policy for 85*l.*

8. On the 30th of October, the plaintiff arranged with Messrs. Ogle & Co., of London, for an advance of 1446*l.* 4*s.* 2*d.* against the bill of lading and policy, and agreed to consign the cargo to their Calcutta correspondents. The bill of lading and the policy were accordingly handed by the plaintiff to Messrs. Ogle & Co., who procured Mollwo, March, & Co., of London, to advance to them 1446*l.* 4*s.* 2*d.*, upon their delivering to them the bill of lading and policy and certain other securities. This sum so obtained from Mollwo, March, & Co., was on the following day paid by Ogle & Co. to the plaintiff, in pursuance of that arrangement.

9. On the 26th of November, 1863, the *Margaret Quale* left the Birkenhead Docks in tow of a steam-tug, and shortly afterwards encountered severe weather. On the 27th, the steam-tug left her, and she then proceeded under sail on her outward voyage. From the 27th of November the weather continued very bad; and on the 2nd of December the vessel sprung a leak, and the master finding that the pumps were choked, made for the Bristol Channel in order to put into some port.

10. On the 4th of December, at 8 P.M., the master, finding it impossible to weather Hartland Point, both anchors were let go; but, as they did not hold the ship, the masts had to be cut away, and on the same day the mate and four of the crew were dispatched for assistance.

11. Between the 4th and 7th of December the ship's anchors were slipped, and the vessel encountered a variety of disasters. During that time salvage services were rendered to her by the smack *Ranger*, of Clovelly, and the *Pilot* and *Iron Duke*, steam-tugs of Cardiff.

12. The tugs shortly afterwards towed her on to the East Bank in the Penarth Roads, where she lay right on her port side for several tides. Whilst she was so lying there, she sustained injury by straining, in consequence of the strong current, her want of anchors, and the damage she had previously sustained.

13. It is usual for vessels to bring up to anchor on the East

Bank, there to take the ground, and wait at anchor for sufficient water to enable them to enter the Cardiff Docks.

14. On the 10th of December the two tugs towed the *Margaret Quale* into Cardiff East Dock, where she was at once taken possession of by Mr. Millar, the receiver of wrecks at that port. A few days afterwards, the ship and cargo were arrested in two salvage suits which had been instituted in the Court of Admiralty, in the sums of 1500*l.* and 3000*l.*, on behalf of the smack and two steam-tugs, in respect of the salvage services so rendered by them. In these salvage suits the plaintiff did not put in bail, and the cargo consequently remained under arrest.

15. On the 26th of December, Millar, who was also deputy-marshal of the Admiralty Court, proceeded to discharge the cargo in pursuance of a decree made in the salvage suits. The discharge was completed on the 21st of January, 1864, when the salt, which weighed 1227 tons, was warehoused in the Bute Dock; the residue of the cargo having been washed or pumped out of the ship during the voyage.

16. In the two salvage suits it was agreed between the proctors for the salvors and Mr. Elmslie, the solicitor for the plaintiff, that the value of the cargo salved should, for the purpose of those suits, be taken to be 800*l.* At the time when this agreement was come to Mr. Elmslie had not, however, informed himself of the actual value of the cargo.

17. But on the 28th of May, 1864, the Court of Admiralty awarded in the two salvage suits the sums of 133*l.* 6*s.* 3*d.* and 66*l.* 13*s.* 4*d.* to the two tugs respectively, as the remuneration payable to them in respect of the salvage of the cargo.

18. When the cargo was discharged at Cardiff, it was found to be in a very damaged condition, arising in the following manner from perils of the seas:—Sea-water, which, after having come in contact with the iron bolts of the ship, fell upon or otherwise reached the salt, and caused it to be coloured with brownish and yellowish streaks. A cargo of salt so discoloured is not merchantable at Calcutta; and, in order to have made any part thereof available for sale at that port, it would have been necessary to have picked out such portions as were perfectly clean or only very slightly discoloured, and to have collected the same for re-shipment. It would

1872

DE MATTOS v. SAUNDERS.

have been possible in this manner to have picked out and collected about 300 or 400 tons of salt sufficiently clean to be saleable at Calcutta. This operation, however, would have been attended with great difficulty; and it is doubtful whether the salt so collected would have fetched at Calcutta a price exceeding the import duty payable at that port. Such import duty was about 9*l.* 2*s.* per ton; and the price of perfectly clean salt at Calcutta was, including duty, about 12*l.* per ton.

19. The plaintiff, who had abstained as aforesaid from putting in bail in the Admiralty suits, did not in any way interfere with the salt; and, in August, 1864, Mr. Millar, in pursuance of a commission of appraisement and sale issued by the Court of Admiralty, caused the salt to be appraised and valued, and the same was valued at 245*l.*

20. Shortly afterwards, in pursuance of the same commission of appraisement and sale, Mr. Millar, having advertised the sale in the usual manner, put up the salt by public auction. There was, however, only one bid, viz. 2*s.* per ton. This was not accepted by Mr. Millar, who in the following September sold the salt by private contract for 240*l.*

21. The expense of discharging, weighing, and placing the salt in the warehouse amounted to 76*l.* 14*s.* 3*d.*, and the warehouse-rent up to the time of the sale amounted to 158*l.* 11*s.* These expenses, which were paid by Mr. Millar, amounted, together with his ordidary fees and proper expenses as deputy-marshal, to the sum of 240*l.*

22. As regards the ship, she was placed in a dry-dock at Cardiff on the 13th of February, 1864, and was there surveyed a few days afterwards. All the damage she had sustained might have been repaired in three or four months, at an expense of 6700*l.*; and when so repaired she would have been worth 8000*l.*, and would have been as good a vessel as she was at the commencement of the voyage, and perfectly seaworthy for carrying any dry and perishable cargo. She was, however, actually repaired at a cost of 13,331*l.* These repairs, which were completed in February, 1865, made her a much better ship than she was at the commencement of the insured voyage, although her value when so repaired was less than 13,331*l.*

23. In March, 1865, the ship, under the name of the *Rockingham Castle*, sailed with a cargo from Cardiff.

24. Certain correspondence passed after January, 1864, between the following persons,—the plaintiff, Mr. Quale (the owner of the ship), Mr. Sercombe (the broker who effected the policy sued on, and who communicated to the underwriters the information he received in the letters contained in the correspondence), Mr. Elmslie (who acted as solicitor for the plaintiff and also for Messrs. Ogle & Co.), Messrs. Duncan, Squarey, & Blackmore (the solicitors for Mr. Quale), and Messrs. Mollwo, March, & Co., the merchants already mentioned. This correspondence was set out in an appendix.

25. On the 4th of February, 1864, the plaintiff executed a deed of inspectorship (1) in accordance with the provisions of the Bankruptcy Act, 1861, and was at that time indebted to the defendant in the sum of 47*l.* 15*s.* 7*d.* The defendant was a party assenting to the deed, and has received thereunder two dividends upon his debt, amounting together to 2*l.* 13*s.* 9*d.* A copy of the deed was to be referred to as part of the case.

26. The said sum of 1446*l.* 4*s.* 2*d.* has not been repaid by the plaintiff to Messrs. Ogle & Co., nor by the latter to Mollwo, March, & Co.; and this action is brought in the name of the plaintiff by and on account of Mollwo, March, & Co., in whose hands the bill of lading and policy of insurance still remained.

27. A copy of the pleadings was set out in the appendix; all questions as to any amendment thereof being reserved for the Court: and the Court were to be at liberty to draw all such inferences of fact as a jury would be justified in drawing.

The question for the consideration of the Court was, whether, under the circumstances stated in the case, the plaintiff was entitled to recover on the policy.

If the Court should be of opinion that the plaintiff was entitled to recover for a *total loss*, judgment was to be entered for the plaintiff for such sum as the Court should direct, with costs. If the Court should be of opinion that the plaintiff was entitled to recover for a *partial loss* only, judgment was to be entered for such sum and upon such terms as to costs and otherwise as the Court should think fit; the Court being at liberty to direct any further inquiry it might think proper, for the purpose of ascertaining the sum which in such case the plaintiff was entitled to recover.

---

(1) See the deed set out in *Strick* v. *De Mattos*, 3 H. & C. 22; 33 L. J. (Ex.) 276. 10 Jur. N.S. 753.

If the Court should be of opinion that the plaintiff was not entitled to recover in this action, judgment was to be entered for the defendant, with costs.

Butt, Q.C. (*C. Russell, Q.C.*, and *Cohen* with him), for the plaintiff. Three questions arise upon this special case,—1. Whether the facts shew a total loss of the salt,—2. Whether there was a stranding,—3. Whether under the circumstances the underwriters can set off the debt due from the plaintiff to them, under the mutual credit clause of the Bankrupt Act.

1. It is clear upon the case that the salt or a portion of it existed in specie, so that there could be no total loss apart from its having been taken out of the possession of the plaintiff by the proceedings of the salvors in the Admiralty Court. The question therefore must be whether it was in the hands of the officers of that Court in such a state and under such circumstances that, exercising a reasonable discretion, the plaintiff ought to have bailed it. It appears that the salt was so damaged by sea perils that only about 300 or 400 tons could by a difficult and expensive process be made merchantable. Ultimately the cargo was sold, and the whole proceeds of the sale were absorbed by the expenses incurred in the salvage suits. This amounted to a total loss within the principle laid down by Lord Abinger and the Court of Exchequer Chamber in *Roux* v. *Salvador* (1),—"If the goods, once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage, in such a state, though the species be not utterly destroyed, that they cannot with safety be reshipped into the same or any other vessel; if it be certain that, before the termination of the original voyage, the species itself would disappear, and the goods assume a new form, losing all their original character; if, though imperishable, they are in the hands of strangers not under the control of the assured; if by any circumstance over which he has no control they

---

(1) 3 Bing. N. C. 266, at p. 279.

can never, or within no assignable period, be brought to their original destination: in any of these cases, the circumstance of their existing in specie at *that forced termination* of the risk is of no importance. The loss is in its nature total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle." The like was held in *Mullett* v. *Shedden* (1), which was a case of unlawful seizure. The plaintiff was not under the circumstances called upon to put in bail in the salvage suits. *Stringer* v. *English and Scottish Marine Insurance Co.* (2) is a strong authority to the same effect. The assured here could not, as was observed by Blackburn, J., in giving judgment in that case (3), by any means which they could reasonably be called on to adopt, have prevented the sale by the Admiralty Court, which at once put an end to all possibility of having the goods restored in specie, and consequently entitled the assured to come upon their insurers for a total loss.

[WILLES, J. The seizure in that case was one of the perils insured against: not so here.]

2. At all events there was a stranding here. As to this the statement in the case is, that the vessel was towed by the salvors on to the East Bank in the Penarth Roads, where she lay right on her port side for several tides. The statement in par. 13, that "it is usual for vessels to bring up to anchor on the East Bank, there to take the ground, and wait at anchor for sufficient water to enable them to enter the Cardiff Docks," does not negative the fact that this vessel was there by a peril of the sea, and not in the ordinary course of the voyage. She did not go there to anchor in the usual way, for she had no anchors. This was clearly a stranding within the definition of "stranding" given in *Kingsford* v. *Marshall* (4), *Bishop* v. *Pentland* (5), *Wells* v. *Hopwood* (6) and *Corcoran* v. *Gurney*. (7) In *Wells* v. *Hopwood*, Taunton, J., says (8): "Where the event happens in the ordinary course of navigation, as, for instance, from the regular flux and reflux of the tide, with-

---

(1) 13 East, 304.

(2) Law Rep. 4 Q. B. 676; in error, Law Rep. 5 Q. B. 599.

(3) Law Rep. 4 Q. B. at p. 692.

(4) 8 Bing. 458, at p. 463.

(5) 7 B. & C. 219.

(6) 3 B. & Ad. 20.

(7) 1 E. & B. 456; 22 L. J. (Q.B.) 113. 17 Jur. 1152.

(8) 3 B. & Ad. at p. 23.

out any external force or violence, it is not a stranding; but, where it arises from an accident, and out of the common course of navigation, it is." The judgment in *Corcoran* v. *Gurney* (1) is equally conclusive.

[WILLES, J. Parke, J., in *Wells* v. *Hopwood* (2), recognized the propriety of the decision in *Bishop* v. *Pentland* (3), because the "vessel was stove in and greatly injured by falling over."]

3. As to the claim of set-off under the mutual credit clause of the Bankrupt Act, it is enough to say that De Mattos is not suing in his own right.

[WILLES, J., referred to *Winch* v. *Keely*. (4)]

Sir G. Honyman, Q.C. (*J. C. Mathew* with him), for the defendant. There is no pretence for saying that this could be more than a partial loss: *Thornely* v. *Hebson* (5); *Rosetto* v. *Gurney*. (6) The question then is, was there a stranding. The result of the authorities upon the subject, from Emerigon, c. 12, § 13, to the latest decision in our Courts, is, that there is no stranding where the vessel is laid on a spot where it is usual to place vessels, and she is intentionally placed there for the purpose of taking the ground, and not merely for the purpose of avoiding the force of the wind and waves. In all the instances of stranding which can be referred to, the vessel has grounded at an unusual place, or she has been damaged by the breaking of a rope, as in *Wells* v. *Hopwood* (7), or stoving in, as in *Bishop* v. *Pentland*. (3) If there be no damage, there is no stranding.

[WILLES, J. This vessel was run on shore to prevent a worse disaster; and she remained on her port side three days. Surely that was a stranding.]

Then, the debt due from the plaintiff may be set off by virtue of the mutual credit clause of the Bankrupt Act, 12 & 13 Vict. c. 106, s. 171. Section 197 of 24 & 25 Vict. c. 134 places one who has executed a deed under s. 192 in the same position in this respect as if he had been adjudicated a bankrupt.

[WILLES, J. The right of set-off attaches only upon a debt which belongs at law and in equity to the bankrupt: *Scott* v. *Surman.* (1) The mutual credit clause of the Bankrupt Act is only appropriate to a settlement of claims between the bankrupt himself and a creditor: *Turner* v. *Thomas.* (2) Here, the whole equitable interest in the salt was out of the plaintiff: his assignee or trustee could not sue upon this policy. The loss took place in December, 1863; and De Mattos's deed was dated the 4th of January, 1864.]

---

(1) 1 E. & B. 456; 22 L. J. (Q.B.) 113. 17 Jur 1152

(2) 3 B. & Ad. at p. 31.

(3) 7 B. & C. 219.

(4) 1 T. R. 619.

(5) 2 B. & Ald. 513.

(6) 11 C. B. 176; 20 L. J. (C.P.) 257.

(7) 3 B. & Ad. 20.

Wilson v. *Gabriel* (3) and *Watson* v. *Mid-Wales Ry. Co.* (4) were referred to.

WILLES, J. This case has been very fully discussed; and we have arrived at a conclusion upon each of the points argued so distinct that we do not think it desirable to take time for consideration. Notwithstanding, therefore, the importance of the questions involved, we proceed at once to give judgment.

I am of opinion that there should be judgment for the plaintiff for a partial loss. The contention that the loss, partial at the time it was incurred, was converted into a total loss by the acts of the salvors and the seizure and sale under the orders of the Court of Admiralty must fail, because those acts and proceedings were not the natural and necessary consequences of a peril insured against. The assured is entitled to recover from the underwriters for a loss arising from sea-damage and its proximate consequences: but it is not a proximate consequence of sea-damage in general that there should be proceedings in the Court of Admiralty; a link is wanting. As well might it be said that a proceeding by salvors setting up a false claim would convert a partial into a total loss; which would be absurd. There was no natural connection between the sea-damage here and the seizure and sale under the decree of the Admiralty Court. The cases cited of hostile seizure and condemnation by a Prize Court have no application. In such a case the original seizure is primâ facie a total loss: all that follows is only the necessary consequence of the seizure.

It appears from the case that there was a very considerable partial loss of the salt occasioned by perils of the sea. For the purposes of this cause, we may call it either a total loss of part or a partial loss of the whole cargo: but, whichever it is called, it is not a loss within the policy, so long as any substantial part of the salt remains, because of the memorandum whereby salt is warranted free from average unless general or the ship should be stranded. That makes it necessary to consider whether or not there was a stranding here. As to this, the material facts are as follows:—Having sailed on her voyage for Calcutta, the ship encountered such severe weather that she became leaky, and, her pumps being choked, the master made for the Bristol Channel in order to put into some port. Being unable to weather Hartland Point, both anchors were let go; but, as they did not hold, the masts had to be cut away, the anchors were slipped, and ultimately the vessel fell into the hands of salvors, who towed her on to the East Bank in the Penarth Roads, where she lay on her port side for several tides; and, whilst so lying there, she sustained injury by straining, "in consequence of the strong current, her want of anchors, and the damage she had previously sustained." The effect of that statement is, that the vessel by reason of distress at sea was reduced to such a state that it became necessary to lay her on a bank quite out of the ordinary course of her voyage. It was contended on the part of the defendant that there are facts found in the case which ought to induce the Court to come to the conclusion that she was in a place where it is usual for vessels to be, and was intentionally placed there. Those facts are found in par. 13, which states that "it is usual for vessels to bring up to anchor on the East Bank, there to take the ground, and wait at anchor for sufficient water to enable them to enter the Cardiff Docks." That seems to me to fall very far short of a statement which would justify the conclusion that the vessel was laid on the East Bank in the ordinary way whilst waiting for water to float her into the docks. She had lost both her anchors; and, reading the 12th paragraph in the ordinary sense of the language used in it, we find that she lay on her port side for several tides, at high as well as low water, exposed to bump on the shore at the rise and fall of the tide. She was not floating at anchor, because she had no anchors. The only rational conclusion therefore is, that, in consequence of the disasters which had occurred to her, she was lying there in an unusual way. I entirely agree that the mere fact of a vessel sustaining an unexpected injury by reason of the hardship of the bottom (provided it be in a place where she is properly laid in the ordinary course of the voyage), will not turn the taking the ground into a stranding. But the facts do not place this case in that category. The remarks of Parke, J., in *Wells* v. *Hopwood* (1) are an authority here, though the decision itself cannot be relied on. Upon the whole, it seems to me that, applying the principle there laid down by Lord Tenterden to what happened here,—the necessary beaching of the vessel in consequence of her crippled condition resulting from perils of the sea,—did amount to a stranding, as described in that case. "Where," says his Lordship (2), "a vessel takes the ground in the ordinary and usual course of navigation and management in a tide river or harbour upon the ebbing of the tide or from natural deficiency of water, so that she may float again upon the flow of tide or increase of water, such an event shall not be considered a stranding within the sense of the memorandum. But, where the ground is taken under any extraordinary circumstances of time or place, by reason of some unusual or accidental occurrence, such an event shall be considered a stranding within the meaning of the memorandum."

---

(1) Willes, 400.

(2) Law Rep. 6 C. P. 610.

(3) 4 B. & S. 243.

(4) Law Rep. 2 C. P. 593.

Upon these grounds, I come to the conclusion that the facts stated in this special case do make out a stranding, and consequently that the underwriters are liable for a partial loss.

The remaining question is whether the underwriters can set off the sums due from the plaintiff to them. That this cannot be done under the Statutes of Set-off is clear: nor do I think it could be done under the law of compensation or set-off as stated in Emerigon, c. 3, § 8, because it is a rule not only of the Roman law, but also, I believe, in all the modern continental codes, that there can be no set-off of unliquidated damages. The only example to the contrary that I am aware of is, where the two demands arise out of the same transaction, as in the case of goods damaged by negligence during the voyage, the value of which might be set off against the claim for freight. I am not speaking, of course, of this country, where no such law prevails. Set-off here stands upon equitable doctrines, or upon the Statutes of Set-off, or upon the mutual credit clause of the Bankrupt Act, 12 & 13 Vict. c. 106, s. 171. That clause might be resorted to as against De Mattos or

---

(1) 3 B. & Ad. 20, at p. 29.

(2) 3 B. & Ad. at p. 34.

1872

De Mattos
v.
Saunders.

his assignee, by reason of s. 197 of 24 & 25 Vict. c. 134; for, I take it, that De Mattos stands in the same position under the deed of inspectorship as if he had been a bankrupt; and, in that case, if the action were brought by his assignee, he would be met by a plea that all the bankrupt's interest in the claim had been assigned before his bankruptcy. That would have defeated the action of the assignee. But De Mattos, if suing here in respect of a demand for which his assignee could not have sued, is not met by the mutual credit clause of the Bankrupt Act. He is entitled to sue because the whole interest in the policy is vested in the persons who made advances to the full amount of the value of the salt. The assignee or trustee takes only such property as could be disposed of for the benefit of the creditors; such as they are legally and equitably entitled to. Suing, as the plaintiff does, in respect of a demand which could not pass to his assignee, a plea of mutual credit would be inapplicable. The mutual credit clause applies only to a winding-up of the estate as between the bankrupt and a creditor: *Turner* v. *Thomas.* (1)

There will, therefore, be judgment for the plaintiff for a partial loss, to be assessed in the usual way, with costs; the master being at liberty to strike out anything in the shape of costs which may have been incurred by the claim for a total loss.

Keating, J., concurred.

Butt, Q.C., asked for interest.

Sir G. Honyman, Q.C. The correspondence shews that the underwriters were informed that there had been no stranding, and consequently they were unable to pay money into Court.

Willes, J. I think the justice of the case will be met by allowing the plaintiff two years' interest at 5 per cent.

Judgment for the plaintiff accordingly.

Attorneys for plaintiff: *Elmslie, Forsyth, & Sedgwick.*

Attorneys for defendant: *Waltons, Bubb, & Waltons.*

---

(1) Law Rep. 6 C. P. 610.

HORNE AND ANOTHER *v.* THE MIDLAND RAILWAY COMPANY.

1872
June 6.

Measure of Damages for Breach of Contract—Common Carrier—Notice of special Circumstances.

7 H.L. 375
1 Q.B.D. 70
1 C.P.D. 513

The plaintiffs, who were under a contract to supply a quantity of military shoes to H. in London (for the use of the French army), at 4*s.* per pair, an unusually high price, to be delivered there by the 3rd of February, 1871, sent the shoes to the defendants' station at K. in time to be delivered in the usual course in the evening of that day, when they would have been accepted and paid for by the consignee; and the station-master had notice (which for the purpose of the case was assumed to be notice to the company) at the time that the plaintiffs were under a contract to deliver the shoes by the 3rd, and that unless they were so delivered they would be thrown on their hands, but no notice was given to the defendants that the contract with H. was, owing to very exceptional circumstances, not an ordinary contract.

The shoes not arriving in London until the 4th, H. rejected them, and the plaintiffs were ultimately obliged to sell them at a loss of 1*s.* 3*d.* per pair,—2*s.* 9*d.* per pair being the ordinary market value.

In an action against the defendants for their breach of contract, they paid into Court a sum sufficient to cover any ordinary loss occasioned by the delayed delivery; but the plaintiffs further claimed 267*l.* 3*s.* 9*d.*, the difference between the price at which they had contracted to sell the shoes to H. and the price which they ultimately fetched:—

Held, that they were not entitled to recover the latter sum, the damage not being the natural consequence of the defendants' failure to perform their contract, and the defendants not having had notice that the sale to H. was at an exceptional price.

Affd. in Ex. Ch. L.R. 8 C.P. 131.

A VERDICT was taken for the plaintiffs for 283*l.* 7*s.* 9*d.*, subject to the opinion of the Court upon the following case:—

1. The plaintiffs are wholesale boot and shoe manufacturers at Kettering, in Northamptonshire.

2. In January and February, 1871, the plaintiffs were under a contract with Messrs. Hickson & Sons, of West Smithfield, to supply them with 20,000 pairs of military shoes, at 4*s.* per pair. The last day for delivery was the 3rd of February, 1871; and all that were not so delivered would be thrown on the plaintiffs' hands.

3. The plaintiffs from time to time during the month of January delivered to Hickson & Sons, under their contract, shoes amounting in the aggregate to many thousands of pairs; and these were accepted by Hickson & Sons; but 4595 pairs which were de-

1872

HORNE v. MIDLAND RAILWAY CO.

livered by the plaintiffs to the defendants at Kettering, consigned to Hickson & Sons in London, and were not tendered by the defendants to Hickson & Sons till the 4th of February, were rejected by Hickson & Sons, and thrown on the plaintiffs' hands, and were sold by them at a loss.

4. This action was brought to recover damages from the defendants for the loss so sustained by the plaintiffs. The defendants paid 20*l.* into Court.

5. The 4595 pairs of shoes (hereinafter called "the goods") were delivered to the defendants at Kettering, consigned to Hickson & Sons, in time to have been delivered in London to the consignees in the evening of February the 3rd, when they would have been accepted by the consignees; but they were not tendered by the defendants to the consignees till the morning of the 4th, when the consignees refused them.

6. Notice was given by the plaintiffs to the defendants' station-master at Kettering, at the time when the goods were delivered to him, that the plaintiffs were under a contract to deliver by the evening of the 3rd of February; and it was to be taken, for the purposes of this case, that notice was at the same time given by the plaintiffs to the defendants, through their station-master, that the goods would be thrown upon the plaintiffs' hands if they were not so delivered by the said 3rd of February.

7. The goods, if received on the 3rd of February, would have been paid for by the consignees at the rate of 4*s.* per pair.

8. After the refusal of the consignees to accept the goods, the plaintiffs used their utmost endeavours to sell them at a good price, but could only get 2*s.* 9*d.* per pair for them, at which price they sold them.

9. The goods were in fact required by Hickson & Sons for a contract with a French house for supply to the French army; but, except as aforesaid, no notice of this fact, nor any information as to the extent or probable extent of damage in case of a breach of contract by the plaintiffs, was given to the defendants.

10. In consequence of the cessation of the war between France and Prussia, Hickson & Sons, except for the circumstance that they had the contract in question with the French house, could not have sold the goods at any better price than that actually ob-

tained, if they had received them on the evening of the 3rd of February instead of the morning of the 4th.

11. The plaintiffs claim to recover from the defendants as damages in this action the difference between 4*s.* per pair, the contract price, and 2*s.* 9*d.*, the price of actual sale. The defendants dispute that this is the proper measure of damages, and say that the plaintiffs are not entitled to recover damages in this action in respect of the loss sustained by reason of the goods having been sold at 2*s.* 9*d.* per pair instead of at the contract price of 4*s.* per pair.

12. It was agreed that the Court should be at liberty to draw any inference or to find any facts which in the opinion of the Court a jury ought to have drawn or found.

If the plaintiffs were entitled to the difference between the contract price and the price of actual sale, the damages were 267*l.* 3*s.* 9*d.* above the amount paid into Court. If they were not entitled to damages in respect of the price of actual sale, the 20*l.* paid into Court was sufficient to cover the incidental expenses of sale and delivery to the ultimate purchaser, of attempts at re-sale, and any ordinary or general damages to which they were entitled. But, if the Court laid down any principle for assessing damages under which the plaintiffs might conceive that they were entitled to more than 20*l.*, then the damages were to be referred.

Lumley Smith (*Field, Q.C.*, with him), for the plaintiffs. The proper measure of damages under the circumstances of this case is, the loss which the plaintiffs have sustained through the defendants' breach of contract, and that is, the difference between the price for which they had contracted for the sale of the shoes to Hickson & Sons, and which the latter would have paid if the shoes had been delivered on the 3rd of February, and the price at which they were ultimately sold. The goods were delivered at the station in due time, and the station-master was informed that, unless they were delivered to the consignees on the 3rd of February, they would be thrown upon the plaintiffs' hands. But for that notice (which is admitted to be notice to the company), the measure of damages would have been the difference in the market value. That notice, however, brings the case within the rule in *Hadley* v. *Baxen-*

1872

HORNE v. MIDLAND RAILWAY CO.

dale (1), where Alderson, B., in delivering the judgment of the Court, says (2): "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." And he goes on to say that, "if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated." That is precisely this case; for, when the contract was entered into, it must have been contemplated by both parties that a failure to deliver the shoes on the 3rd of February would result in the loss which the plaintiffs have sustained. That rule was acted upon in *Cory* v. *Thames Ironworks Co.* (3), where Blackburn, J., says: "The damages are to be what would be the natural consequences of a breach under circumstances which both parties are aware of." And this distinguishes the cases of *Wilson* v. *Lancashire and Yorkshire Ry. Co.* (4), and *British Columbia Saw-Mill Co.* v. *Nettleship* (5), from the present case. But, in the former of those cases, Willes, J., says (6): "The damage in respect of the goods being depreciated in value in consequence of their arrival at a time when they were less in demand and less capable of being applied usefully by the plaintiff, is the ordinary, natural, and immediate consequence of the delay, for which the carrier is answerable." In *Collard* v. *South Eastern Ry. Co.* (7), the defendants had no notice that the goods were sent for sale; but Martin, B., said (8): "It was proved that if they had been

---

18 Jur 358.

(1) 9 Ex. 341; 23 L. J. (Ex.) 179.

(2) 9 Ex. at p. 354. 18 Jur 359.

(3) Law Rep. 3 Q. B. 181, at p. 186.

(4) 9 C. B. (N.S.) 632; 30 L. J. (C.P.) 232. 7 Jur NS. 663

(5) Law Rep. 3 C. P. 499.

(6) 9 C. B. (N.S.) at p. 644. 7 Jur NS 66

(7) 7 H. & N. 79; 30 L. J. (Ex.) 393. 7 Jur NS. 950

(8) 7 H. & N. at p. 86.

1872

HORNE
v.
MIDLAND
RAILWAY CO.

brought to market on the proper day they would have fetched a certain price, but, not being brought until a later day, the market-price in the meantime fell, and the value of the hops was diminished by the amount of 65*l.* If that be not a direct, immediate, and necessary consequence of the defendants' breach of duty, it is difficult to understand what would be." In *Borries* v. *Hutchinson* (1), the plaintiffs were allowed to recover the loss of profit on the sale of the goods.

[WILLES, J. The true ground of the decision there was that there was no other market for the article.]

Suppose these goods had been altogether lost, what damages could the plaintiffs have recovered in trover? Clearly 4*s.* per pair. In *France* v. *Gaudet* (2), the plaintiff purchased champagne lying at the defendant's wharf at 14*s.* per dozen, and re-sold it at 24*s.* to the captain of a ship about to leave England. The defendant refused to deliver the wine, and the plaintiff was unable to fulfil his contract, champagne of a similar quality not being procurable in the market. The defendants had no knowledge of the sale, or of the purpose for which the plaintiff required delivery of the champagne. In an action for the conversion, it was held that the plaintiff was entitled, as damages, to the price at which he had sold the champagne,—that being its actual value at the time of the conversion. There is nothing upon the face of the case to warrant an inference that the contract with Hickson & Sons was an exceptional one at the time it was made.

H. James, Q.C. (*Sturge* with him), for the defendants. In the absence of notice, the damages which the plaintiffs would have been entitled to recover would have been covered by the amount paid into Court. The goods had sustained no deterioration or diminution of market value in consequence of the delay, as was the case in *Wilson* v. *Lancashire and Yorkshire Ry. Co.* (3) The plaintiffs must make out that such a notice was given to the defendants as bound them to indemnify the defendants for the loss which they claim. It was not enough to say that they had made a contract which required delivery by a given day; the notice

---

(1) 18 C. B. (N.S.) 445; 34 L. J. (C.P.) 169. 11 Jur. N.S. 267

(2) Law Rep. 6 Q. B. 199.

(3) 9 C. B. (N.S.) 632; 30 L. J. (C.P.) 232. 7 Jur. N.S. 950

1872

HORNE v. MIDLAND RAILWAY CO.

should have informed the defendants of the very terms of the contract, seeing that it was for an exceptional price so far above the ordinary market value of the goods.

[WILLES, J. The case does not shew whether or not the French house were absolved from their contract by the non-delivery of the shoes to Hickson & Sons on the 3rd of February; nor does it appear at what time the Franco-German war ceased.]

Nor when the contract with the French house was made. The true rule is that stated by Blackburn, J., in *Cory* v. *Thames Ironworks Co.* (1): "The measure of damages when a party has not fulfilled his contract is what might be reasonably expected in the ordinary course of things to flow from the non-fulfilment of the contract; not more than that; but what might be reasonably expected to flow from the non-fulfilment of the contract in the ordinary state of things, and to be the natural consequences of it. The reason why the damages are confined to that is, I think, pretty obvious, viz. that, if the damage were exceptional and unnatural damage, to be made liable for that would be hard upon the seller, because, if he had known what the consequence would be, he would probably have stipulated for more time, or, at all events, used greater exertions if he knew that extreme mischief would follow from the non-fulfilment of his contract." So, in *British Columbia Saw-Mill Co.* v. *Nettleship*, Willes, J., says (2): "I am disposed to take the narrow view, that one of the contracting parties ought not to be allowed to obtain an advantage which he has not paid for. The conclusion at which we are invited to arrive would fix upon the ship-owner, beyond the value of the thing lost, and the freight, the further liability to account to the intended mill-owners, in the event of a portion of the machinery not arriving at all or arriving too late through accident or his default, for the full profits they might have made by the use of the mill if the trade were successful and without a rival. If that had been presented to the mind of the ship-owner at the time of making the contract, as the basis upon which he was contracting, he would at once have rejected it." It is clear, therefore, that the only damage the defendants are liable for is, any diminution in the ordinary market value of the goods between the day on which they ought

(1) Law Rep. 3 Q. B. at p. 190.

(2) Law Rep. 3 C. P. at p. 508.

1872

HORNE
v.
MIDLAND
RAILWAY CO.

to have been delivered in London and the day on which they were tendered to the consignees.

Lumley Smith, in reply. The defendants were entitled to notice of the kind of damage which would probably result from their breach of contract, but not of the quantum. It may be conceded that the mere fact of knowledge will not suffice; the defendant must have notice to fix him with the consequences of his breach of contract, where such consequences are of an unusual character. *Walker* v. *Jackson* (1), *Josling* v. *Irvine* (2), and *Gee* v. *Lancashire and Yorkshire Ry. Co.* (3), were also referred to.

WILLES, J. This case raises a very nice question upon the measure of damages to which a common carrier is liable for a breach of his contract to carry goods. It would seem that the damages which he is to pay for a late delivery should be the amount of the loss which in the ordinary course of things would result from his neglect. The ordinary consequence of the non-delivery of the goods here on the 3rd of February would be that the consignee might reject them, and so they would be thrown upon the market generally, instead of going to the particular purchaser; and the measure of damages would ordinarily be in respect of the trouble to which the consignor would be put in disposing of them to another customer, and the difference between the value of the goods on the 3rd and the amount realized by a reasonable sale. That primâ facie would be the sum to be paid, in the absence of some notice to the carrier which would render him liable for something more special. These consequences would refer to the value of the goods at the time of their delivery to the carrier, the goods being consigned to an ordinary market and being goods in daily use and not subject to much fluctuation in price. In the present case, taking 2*s.* 9*d.* per pair as the value of the shoes, the ordinary damages would be the trouble the plaintiffs were put to in procuring some one to take them at that price, plus the difference, if any, in the market value between the 3rd and the 4th of February. I find nothing in the case to shew that there was any diminution in the value between those days. The plaintiffs' claim, therefore, in that respect would be covered by the 20*l.* paid into Court.

(1) 10 M. & W. 161.

(2) 6 H. & N. 512; 30 L. J. (Ex.) 78.

(3) 6 H. & N. 211; 30 L. J. (Ex.) 11.

6 Jur. N.S. 1118

But they claim to be entitled to 267*l.* 3*s.* 9*d.* over and above that sum, on the ground that these shoes had been sold by them at 4*s.* a pair to a consignee who required them for a contract with a French house for supply to the French army, which price he would have been bound to pay if the shoes had been delivered on the 3rd of February. The special price which the consignee had agreed to pay was the consequence of the extraordinary demand arising from the wants of the French army; and the refusal of the consignee to accept the goods on the 4th was caused by the cessation of the demand for shoes of that character by reason of the war having come to an end. The market-price, therefore, we must assume, to have been 2*s.* 9*d.* a pair when the shoes were delivered to the carriers; and the circumstance which caused the difference was that the plaintiffs had had the advantage of a contract at 4*s.* a pair before the extraordinary demand had ceased. Was that, then, an exceptional contract? It was not, I take it, at the time the contract was entered into; but it was at the time the shoes were delivered to the carriers. The plaintiffs sustained a loss of 1*s.* 3*d.* a pair on the 4595 pairs of shoes which they failed to deliver in pursuance of their contract. It was, so to speak, a penalty thrown upon them by reason of the breach of contract. In that point of view, the contract was an exceptional one at the time the shoes were delivered to the carriers; and they ought to have been informed of the fact that by reason of special circumstances the sellers would, if the delivery had taken place in time, have been entitled to receive from the consignee a larger price for the shoes than they would have been entitled to in the ordinary course of trade. It must be remembered that we are dealing with the case of a common carrier, who is bound to accept the goods. It would be hard indeed if the law were to fix him with the further liability which is here sought to be imposed upon him, because he has received a notice which does not disclose the special and exceptional consequences which will or may result from a delayed delivery. I think the law in this respect has gone quite as far as good sense warrants. The cases as to the measure of damages for a tort do not apply to a case of contract. That was suggested in a case in Bulstrode (1), but the notion was corrected in *Hadley* v.

(1) *Everard* v. *Hopkins*, 2 Bul. 332.

1872

HORNE
v.
MIDLAND
RAILWAY CO.

Baxendale. (1) The damages are to be limited to those that are the natural and ordinary consequences which may be supposed to have been in the contemplation of the parties at the time of making the contract. I go further. I adhere to what I said in *British Columbia Saw-Mill Co.* v. *Nettleship* (2), viz. that "the knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it." Was there any notice here that the defendants would be held accountable for the particular damages now claimed? In the ordinary course of things, the value of the shoes was 2*s.* 9*d.* a pair at the time they were delivered to the defendants to be carried. There was no change in their market value between the 3rd of February and the 4th; and no notice to the carriers that the consignees had contracted to pay for them the exceptional price of 4*s.* a pair. The defendants had no notice of the penalty, so to speak, which a delay in the delivery would impose upon the plaintiffs. It would, as it seems to me, be an extraordinary result to arrive at, to hold that a mere notice to the carriers that the shoes would be thrown upon the hands of the consignors if they did not reach the consignees by the 3rd of February, should fix them with so large a claim, by reason of facts which were existing in the minds of the consignors but were not communicated to the carriers at the time.

For these reasons I come to the conclusion that enough has been paid into Court to cover all the damages which the plaintiffs are entitled to recover, and that there must be judgment for the defendants.

KEATING, J. I am of the same opinion, upon the ground stated by my Brother Willes, viz. that the damages claimed are the consequence not of that which could have been contemplated by the parties, but of an exceptional state of things. No doubt, a carrier who fails to deliver in due time goods entrusted to him is liable in damages for the ordinary and natural consequences of his breach of contract. But I think, giving the fullest effect to *Hadley* v. *Baxen-*

---

(1) 9 Ex. 341; 23 L. J. (Ex.) 179.
18 Jur 358

(2) Law Rep. 3 C. P. 499, at p. 509.

1872

HORNE
v.
MIDLAND
RAILWAY CO.

dale (1) and the rule there laid down, but which ought not to be extended, we cannot hold the defendants liable in respect of a loss resulting from an exceptional state of things which was not communicated to them at the time. There must, if it be sought to charge the carrier with consequences so onerous, be distinct evidence that he had notice of the facts and assented to accept the contract upon those terms. That evidence is not disclosed in this case.

Judgment for the defendants.

Attorneys for plaintiffs: *Sawbridge & Wrentmore.*
Attorneys for defendants: *Beale, Marigold, & Beale.*

July 5.

JOHNSON *v.* BARNES.

Right of Common—Common in Gross not destroyed by Severance—Measure of Levancy and Couchancy—Immemorial Exercise of a Right.

6 Ch D 503, 504, -5, 5 CPD 438, 453, 7 Ch D 579, 7 HL 635

If evidence be given, after long enjoyment of property to the exclusion of others, of such a character as to establish that it was dealt with as of right as a distinct and separate property, in a manner referable to a possible legal origin, it is presumed that the enjoyment in the manner long used was in pursuance of such an origin, which, in the absence of proof that it was modern, is deemed to have taken place beyond legal memory.

The corporation of Colchester claimed and had from time immemorial exercised, either by actual enjoyment (by the free burgesses) or by receipt of rent or acknowledgment, an *exclusive* right of common of pasture in certain lands round the walls of the town (including a farm called Drury Farm), and containing in all about 1023 acres in scattered portions, for all cattle, sheep, and other commonable animals levant and couchant within the borough, from Lammas to Candlemas, save as to any part of the land sown at or before the commencement of such period with corn or other grain, and in that case only after such crops should be harvested or otherwise removed in a due course of husbandry. The corporation had also from time to time, commencing in the reign of Henry VIII, exercised the right of releasing for valuable consideration,—sometimes a gross sum, and sometimes a quit-rent,—their rights of common over certain of the lands subject thereto, still continuing to exercise them over the rest, as before, without any resistance thereto on the ground that the release of part of the land extinguished the whole right of common. In some instances also the common rights of the corporation had been conveyed to strangers, who had exercised such rights. Down to 1834, the right of common over about 831 acres had been so sold or released.

---

(1) 9 Ex. 341; 23 L. J. (C.P.) 179. 18 Jan '858

The plaintiff was lessee of Drury Farm under one Steele, who became possessed of the property in 1838. In the previous title-deeds, which went back to 1583, there was no mention of the right of common; and the conveyance of 1838 was made "subject to any rights or privileges which the corporation, or any person claiming under them, might possess over the same."

The defendant (who was a free burgess of Colchester), claiming the right of common over 110 acres, part of Drury Farm, under a conveyance of January 10, 1870, from a grantee of the corporation, turned his cattle upon the plaintiff's land.

Upon a case stated for the opinion of the Court, with power to the Court to draw inferences of fact:—

Held, that the proved exercise of the right was reconcilable with, and only to be legally accounted for by, the assumption that the right of common was originally granted to the corporation in gross out of the land and each atom thereof, with power to grant or release any part, as in the case of a several pasture; and consequently that the right of common was not defeated by the grant or release of part,—upon the principle that "antiquity of time justifies all titles, and supposes the best beginning the law can give them."

Levancy and couchancy is a mere measure of the number of cattle or other animals that may be put upon the common, and does not necessarily indicate appurtenancy.

Affirmed L.R. 8 C.P. 527.

THIS was an action brought to try the existence of an exclusive or other right of common claimed by the defendant over part of certain land called Drury Farm, within the borough of Colchester, in the county of Essex. The following case was stated for the opinion of the Court, under a judge's order:—

1. The plaintiff is the tenant in possession of Drury Farm, consisting of 115*a.* 1*r.* 31*p.* or thereabouts in the parish of St. Mary at the Walls, in the borough of Colchester, and 11*a.* 3*r.* 24*p.* or thereabouts in the adjoining parish of Laxden, in the said borough. The plaintiff is the lessee of Drury Farm from Adam Rivers Steele and others, who claimed title to the farm under a deed of conveyance dated the 29th of November, 1838, from the trustees under the will of Richard Bradstreet, and which farm was by that deed conveyed subject to any rights or privileges which the mayor and burgesses of Colchester, or any person claiming under them, might possess over the same. The title-deeds of the farm go back as far as the year 1583; and in none of them other than in the conveyance of 1838 is there any reservation of any rights or privileges which the mayor and burgesses of Colchester, or any person claiming under them, might possess over Drury Farm, or any mention of any rights of common as existing upon the same.

2. The defendant is a free burgess of the borough of Colchester, and he is and for many years has been resident within that borough.

3. The borough of Colchester is an ancient borough whereof the free burgesses are and have been from time immemorial a body politic and corporate by divers different names.

4. The said body politic and corporate, for themselves and the resident free burgesses, claim from time immemorial to have exercised and to be entitled to exercise an exclusive right of commoning in certain lands round the walls of the town, including 110*a.* 2*r.* 35*p.* of that portion of Drury Farm which is situate within the parish of St. Mary at the Walls.

5. The right as claimed is for common of pasture for all cattle, sheep, and other commonable animals levant and couchant within the borough from Lammas Day, the 1st of August in every year, till the Feast of the Purification of the Virgin, being the 2nd of February in the succeeding year, on the said lands, save as to any part thereof sown at or before the commencement of such period with corn or other grain, and in that case only after such crops should be harvested or otherwise removed in a due course of husbandry; but the plaintiff does not admit that the right as claimed ever existed. A book intituled Morant's History and Antiquities of Colchester was published in 1768. Portions of some of the documents relating to this alleged right of common are there stated; and it was agreed that the book might be considered, on the argument of the case, to set forth such portions of documents correctly, and also to state accurately the facts as to the exercise of such alleged right by the corporation and the free burgesses up to the time of such publication; but this admission was not to extend to any deductions or inferences of law or fact drawn or expressed by the author of the work, or to contradict or qualify any statement of fact in this case.

6. In the year 1807, a survey and plans were made by the corporation, of the contents and extent of these common lands, which were thereby stated to be 1023*a.* 3*r.* 38*p.*, including the 110*a.* 2*r.* 35*p.* part of Drury Farm.

7. It was admitted, for the purposes of this case, that the common rights of the corporation of Colchester over these lands commenced and were continuously exercised from time immemorial

down to and inclusive of the year 1807; and that, from the year 1807 down to the year 1830, the account-books of the conservators of the said half-year lands appointed by the corporation as hereinafter stated, shew that an annual sum had been paid to them by the occupiers of Drury Farm in lieu of the exercise of the right of common, until the sale of such right hereinafter mentioned to Robert Skitter, who was then the occupier of such lands; and that, from the time of the conveyance hereinafter mentioned to G. H. Errington, Elizabeth Skitter, the wife of Robert Skitter, R. M. Saville, and W. Goodday, the respective occupiers next before the plaintiff of the Drury Farm, paid an annual sum in lieu of such right of common to Errington.

8. These Lammas lands, as appeared from a plan which formed part of the case, do not lie together.

9. From the fourteenth year of the reign of Henry II, down to the reign of Queen Elizabeth, there are no extant orders or regulations by the corporation concerning these Lammas lands. A constitution or bye-law was made by the corporation on the 2nd of August, 1573, that the number of cattle which each burgess was to put on should be three head of great cattle, or, in lieu of the said three head, ten sheep.

10. The constitutions or bye-laws made by the corporation for regulating the enjoyment of the rights of common as between the free burgesses as to the said Lammas lands down to the year 1768 are set out in Morant's book, pp. 92–94, and p. 7 of the appendix, and were to form part of the case.

11. Prior to the publication in 1768 of Morant's History, parcels of the Lammas lands had by the corporation, and by way of release to the owners of such lands, been at divers times made several or whole-year lands; and at p. 94 of Morant there is set out an entry of the court rolls of the corporation, in the time of Henry VIII, upon an occasion of the said Lammas lands so being made several or whole-year lands.

12. Prior to the same year 1768, certain other of the said lands had also been exonerated by the corporation from the right of common of pasture, in consideration of small quit-rents paid to the town.

13. In or prior to the year 1549, certain commissioners were

1872

JOHNSON *v.* BARNES.

directed by the King's writ to hear, examine, and determine certain matters of controversy then depending in parliament amongst the bailiffs, aldermen, common council, and commonalty of the corporation of the borough of Colchester: and by certain original articles settled by the commissioners in the last-mentioned year it was ordered that the bailiffs, aldermen, and common council, being the name of incorporation of the free burgesses, should not at any time thereafter alienate or sell any lands, tenements, or hereditaments appertaining to the said borough or corporation, or make several or sell any common or commons, &c., without the whole assent, consent, and agreement of the bailiffs, aldermen and common council of the said town or borough, or the most part of them.

14. On the 10th of August, 1807, at an assembly of the mayor and free burgesses of the borough of Colchester (being a legal assembly of the governing body thereof), a constitution relating to the common lands belonging to the borough was made, and ordered to be acted on immediately; by which constitution certain officers called conservators were chosen out of the free burgesses of the borough, for the purpose of surveying and managing the common lands, and selling and releasing the rights of common over them, and doing other things in relation thereto, as specified in the said constitution.

15. After this constitution was passed, the alleged right of common over these lands for the season was sold by auction by the corporation annually, both to persons who were and to persons who were not owners of the commonable lands and not free burgesses; and such right was exercised accordingly by the purchasers.

16. From time to time the common rights of the burgesses over divers of the lands included in the 1023*a.* 3*r.* 38*p.* have been by the corporation conveyed and released, as shewn by the accounts of such sales and releases appended to the case. The following are instances of such conveyances and releases:—

In the year 1816, the corporation released the right of common over certain of the said lands to J. K. Rowland, who was the owner of the same lands.

In the year 1819, the corporation conveyed the right of common over other of the said lands to Samuel Phillips, who was not the owner of the same lands or a free burgess.

On the 26th of July, 1834, other rights of common over certain of the said lands were conveyed by the corporation to C. G. Round, who was not the owner of the land.

And in the year 1855 the corporation in like manner conveyed their right of common over other parts of the said commonable lands to S. P. Carr, who was not the owner of the same or a free burgess.

Subsequently to the said respective sales to Rowland, Phillips, Round, and Carr, the said rights of common were never exercised by the corporation, or the free burgesses, or any of them, over the lands or any of the lands the right of common over which had been so conveyed; and the respective grantees thereof enjoyed the full benefit of such several grants by themselves or their respective licensees.

17. In the year 1834 the position of the said lands was as follows, that is to say, the right of common over 831*a.* 0*r.* 33*p.* of the said lands, including the aforesaid 110*a.* 2*r.* 35*p.*, part of Drury Farm, had been sold or released, and the produce thereof, so far as the same had been received, had been invested in the purchase of 10,479*l.* 4*s.* 4*d.* in the 3 per cent. Consols, the dividends whereof have thence hitherto been divided annually amongst the resident burgesses. 151*a.* 1*r.* 2*p.* were said to remain subject to the right of common, and produced from payments made by the owners or occupiers to prevent such right of feeding being exercised, annually about 52*l.*, which has been divided in the same way; and 44*a.* 2*r.* 3*p.* were disputed, and said not to be subject to common,—making a total of 1026*a.* 3*r.* 38*p.*

18. Copies of the assembly books of the corporation of Colchester, the plans, account-books, conveyances, and other documents relating to the common lands, and set forth in the appendix, were to be read and taken to form part of the case.

19. In September, 1830, in pursuance of a resolution of the mayor and burgesses of Colchester, at an assembly held on the 7th of July, 1830, the then conservators (one of whom was the defendant) contracted with Skitter, who was then the lessee of Drury Farm for a term of years expiring on the 29th of September,

1854, and who was not a free burgess, for the sale by the corporation to him of their alleged right of common over that farm for 700*l.*, of which sum 100*l.* only was then paid by Skitter.

20. Robert Skitter died in 1837, leaving a will by which his widow Elizabeth Skitter was constituted sole devisee in fee of his real estate.

21. On the 27th of July, 1840, by deed of that date, the corporation, at the request of Elizabeth Skitter, and in consideration of 600*l.* paid by her, being the residue of the above-mentioned sum of 700*l.*, conveyed or purported to convey to Henry Wittey, his heirs and assigns, the same right of common, in trust for Elizabeth Skitter, her heirs and assigns.

22. On the 30th of December, 1841, by a deed of that date, Wittey, by direction of Elizabeth Skitter conveyed or purported to convey the right of common lastly hereinbefore mentioned to G. H. Errington, his heirs and assigns. After this conveyance, Errington, by indenture dated the 31st of December, 1841, demised or purported to demise such right to Wittey, in trust for Elizabeth Skitter and her assigns for the term of fifty years, if Elizabeth Skitter should so long live, at the rent of 1*d.* only; and Errington covenanted with Elizabeth Skitter that, in case she died before the 29th of September, 1854, when the lease under which she then held the farm called Drury Farm would expire, then he, Errington, would, at the request of the executors, administrators, or assigns of Elizabeth Skitter, or of the person or persons for the time being entitled to the remainder of the term then unexpired in the farm called Drury Farm, grant unto him, her, or them a further lease of the right of common from the day of the decease of Elizabeth Skitter for all the then residue of the existing term in the lease of the said farm, at the rent of 40*l.* for the same right of common, payable half-yearly. On the 19th of November, 1844, Mrs. Skitter and her trustee Wittey, by indenture then dated, assigned or purported to assign unto R. M. Saville all her estate and interest in the right of common in the event of her departing this life on or before the 29th of September, 1854, subject to the yearly rent of 40*l.* during the said term. Mrs. Skitter died about the year 1848; and from her death Saville and W. Goodday, the subsequent tenants and assignees of the said lease of the Drury

Farm, paid until the 29th of September, 1854, the annual sum of 40*l.* per annum to Errington, and since that period, until the occupation of the farm by the plaintiff, an annual sum was paid by Goodday to Errington for the alleged right of common.

23. Errington, who was not a free burgess of the borough of Colchester, on the 1st of January, 1870, by a deed of that date conveyed or purported to convey the right of common to the defendant, his heirs and assigns.

24. Copies of the contract and deeds in the case mentioned were to accompany and to form part of the case.

25. On the 10th of January, 1870, the defendant, for the purpose of asserting the right of common which he claimed to exercise either under the conveyance to him from Errington or as a burgess, entered with a horse and one sheep, being levant and couchant within the borough, and the sole property of the defendant, upon one of the fields comprised in Drury Farm, such field not being sown with corn or grain, and depastured the said field.

26. The Court were to draw inferences of fact.

The questions for the opinion of the Court were,—1. Whether, at the time of his said entry, the defendant was entitled under the deed of January 1st, 1870, to the right of common purporting to have been conveyed to him by that deed over such parts of the 110*a.* 2*r.* 35*p.* part of Drury Farm as had not been sown with corn or grain at or before the 1st of August preceding the said entry; and, if so, for what period and to what extent,—2. Whether, if not entitled under that deed to the said right of common, he was entitled to such right of common as a free burgess, and as against the tenant and owner of the land.

If the Court should be of opinion in the affirmative on either of the above questions, judgment was to be entered for the defendant, with costs. If the Court should be of opinion in the negative on both the above questions, judgment was to be entered for the plaintiff, with costs.

Joshua Williams, Q.C. (*Prentice, Q.C.*, and *Thesiger*, with him), for the plaintiff. Assuming the right of common as claimed once existed, it was lost by the release of a portion of the land which was formerly subject to it. And a right of common appurtenant for cattle levant and couchant on a particular tenement cannot be aliened so as to become a right in gross: *Tyrringham's Case.* (1) In *Rotherham* v. *Green* (2), it was held that a release of part of a common extinguishes the rest; for, say the majority of the Court, "the common is entire through the whole land; wherefore a release in part shall discharge the whole."

[WILLES, J. The real reason is that it casts a greater burthen on the rest of the land.]

In *Miles* v. *Etteridge* (3), the Court say: "A release of common in one acre is an extinguishment of the whole common." So, in Co. Litt. 122. a, it is said: "If a man purchase part of the land wherein common appendant is to be had, the common shall be apportioned, because it is of common right; but not so of a common appurtenant, or of any other common of what nature soever." As to alienation,—In *Daniel* v. *Hanslip* (4), Hale, C.J., said that, "if a man hath common appurtenant to a messuage and land for certain number of beasts, he may alien the same; aliter, if it be common for all his beasts levant and couchant upon the land, he cannot by his alienation sever that from the land." Here, some of the grants, that to Rowland, for instance, were to strangers. To the same effect is *Drury* v. *Kent.* (5) So, in the case of a rent-charge, if part of the land is released, the whole land is released from the rent-charge, "because the rent is entire and against common right, and issuing out of every part of the land, and therefore by purchase of part it is extinct in the whole:" Litt. § 222; Co. Litt. 147. b; *Dennett* v. *Pass.* (6)

[WILLES, J., referred to *Rivis* v. *Watson* (7), and *Delacherois* v. *Delacherois* (8), where all the older authorities are referred to by Lord St. Leonards.]

Denman, Q.C. (*R. E. Turner* with him), for the defendant. The right claimed by the defendant in this case is one which has been exercised by the free burgesses of Colchester from the earliest times. It is not claimed as common appurtenant, nor as a sole and exclusive right of pasturage. It is rather in the nature of common in gross: Co. Litt. 122. b; subject to the limitation of levancy and couchancy within the borough, and subject also to the right of the corporation to convey or release the right as to portions of the land without destroying it as to the rest. The borough of Colchester is a manor in itself, and all the lands over which these rights of common have been exercised are within the limits of the manor.

---

(1) 4 Co. Rep. 36. b.

(2) Cro. Eliz. 593; 2 And. 89; Noy, 67; Goldsb. 114, pl. 6.

(3) 1 Show. 349.

(4) 2 Lev. 67.

(5) Cro. Jac. 14.

(6) 1 Bing. N. C. 388.

(7) 5 M. & W. 255.

(8) 11 H. L. 62.

[WILLES, J. It is, in effect, a right of common exercised by the lords of the manor through the free burgesses of the borough.]

Precisely so. It is a good deal like the right claimed in *Mellor* v. *Spateman.* (1) The case differs from all those cited, in this, that these are scattered lands situate in various parts of the manor, and not lying together so that a release of the right as to one part might operate extinguishment of the right as to the whole. It may be that there were grants from several owners; and in that case a release by one could in no case operate an extinguishment of the whole right. Where the right claimed is one of so peculiar a character as this is, the Court will if possible ascribe to it a legal origin. Every presumption is to be made in favour of a right which has been long enjoyed. There would be nothing illegal or unreasonable in such a grant; and in no other way is it possible to account for the manner in which the land has been dealt with by the corporation and by the various occupiers. The parties under whom the plaintiff claims took the land subject to this right. As far back as the reign of Henry VIII, it appears, portions of the land have been released from this burthen; though no *alienation* appears to have taken place earlier than the year 1807. All the evidence, however, is one way. There is no single instance in which the claim of the corporation has been resisted, though the documents referred to in the case shew repeated instances of its exercise.

[WILLES, J., referred to the Irish fishery case, *Malcolmson* v. *O'Dea.* (2)]

Joshua Williams, Q.C., in reply. A right of common, whether common appendant or appurtenant, or common in gross limited by levancy and couchancy, is discharged by alienation or release of

(1) 1 Notes to Wms. Saund. p. 612. (2) 10 H. L. 593.

1872

JOHNSON v. BARNES.

part. There is no pretence for saying that the right claimed might have been the subject of several grants. There is no trace of it in any of the documents referred to in the case. On the contrary, it appears from Morant, Book i, s. 2, p. 92, that it was originally granted to the free burgesses of Colchester, together with the royal demesnes, in the 14th of Hen. 2. The Court will not presume that there were several grants in identically the same terms. Every presumption ought to be made against a state of things which would cast so great a burthen upon the remaining lands. A claim which has no legal foundation whereon to rest cannot be substantiated by a user, however long: *Attorney-General* v. *Mathias.* (1)

WILLES, J. We entertain no doubt as to the law; but we must take time to look into the documents referred to in the case, and carefully consider the facts.

Cur. adv. vult.

July 5. The judgment of the Court (Willes and Keating, JJ.) was delivered by

WILLES, J. This was an action for putting a horse and a sheep upon a field of the plaintiff. The defendant justifies under a right of common; and the question is, whether such a right of common exists.

The defendant claimed either as a burgess of the borough of Colchester or as grantee under a conveyance of the 10th of January, 1870, from a person claiming under a grant from the corporation of Colchester of the 29th of September, 1830, by which the common over the farm in question was sold for 700*l.*

The corporation claims and has from time immemorial exercised, either by actual enjoyment or by receipt of rent or acknowledgment, an exclusive right of common of pasture in certain lands round the walls of the town, including the place in question, and containing in all 1023*a.* 3*r.* 38*p.*, for all cattle, sheep, and other commonable animals levant and couchant within the borough, from Lammas to Candlemas, on the said land, save as to any part thereof sown at or before the commencement of such period with corn or other grain, and in that case only after such crops should be harvested or otherwise removed in a due course of husbandry. These "Lammas lands," as they are called, do not lie together.

---

(1) 4 K. & J. 579; 27 L. J. (Ch.) 761. 4 Jur N.S. 628

The corporation from time to time, commencing, so far as we are informed, in the reign of Henry VIII, exercised the right of releasing for valuable consideration their rights of common over certain of the lands subject thereto, still continuing to exercise their rights over the rest as before, without any resistance thereto upon the ground that the release of part of the land extinguished the whole common. The first instance of this is to be found in Morant's History of Colchester, 94. A variety of other instances in which this was done appears in the case. Parcels of the land had been at divers times so exonerated before 1768, and many in respect of small quit-rents paid to the town.

In many instances also the common rights of the corporation had been conveyed to various persons, and those persons and not the corporation had thereupon exercised the rights of common.

Between 1807 and 1820, releases were made to more than thirty persons, for sums amounting to more than 5000*l.*

In 1834, the common over 831*a.* 0*r.* 33*p.* had been sold or released, producing the sum of 10,479*l.* 4*s.* 4*d.* in the 3 per cent. Consols; 151 acres remained subject to the rights of common, and 50*l.* a year in all was paid in lieu of the right of feeding there; and, as to 44*a.* 2*r.* 3*p.* (not including the place in question), the right was disputed.

The plaintiff is the lessee of the place in question under Mr. Steele, who purchased the property in 1838. In the previous title-deeds, which go back to 1583, there is no mention of the right of common, therefore it is admitted to have been exercised. The conveyance of 1838 was made "subject to any rights or privileges which the corporation, or any person claiming under them, might possess over the same."

Upon the argument for the plaintiff it was insisted that the right of common was appurtenant and not alienable, and that it had been lost by the first release of part of the land; and the subsequent enjoyment was said to be immaterial, as being had under a mistake of law; and Mr. Denman, in his forcible argument for the defendant, did not dispute these propositions as applicable to an

1872

JOHNSON
v.
BARNES.

ordinary common appurtenant; but he insisted that the proved exercise of the rights was reconcilable with, and only to be legally accounted for by, concluding that the common was originally granted in gross out of the land and each atom thereof, with power to grant or release any part, as in the case of a several pasture. To this it was replied that no such conclusion ought to be drawn from the facts.

We are therefore to pronounce upon the mixed question of law and fact, whether the evidence establishes the grant of a common in gross with power of severance, or only a common appurtenant, inseparable from the land, and destroyed by the first release.

In dealing with this question, we must bear in mind the cardinal rules of prescription, first, that no length of enjoyment can establish a title which could have no legal origin; as, for instance, of an estate or interest which the law does not recognize,—*Bailey* v. *Stephens* (1); *Attorney-General* v. *Mathias* (2); and next, that "antiquity of time justifies all titles, and supposeth the best beginning the law can give them." So that, if evidence be given, after long enjoyment of property to the exclusion of others, of such a character as to establish that it was dealt with as of right as a distinct and separate property, in a manner referable to a possible legal origin, it is presumed that the enjoyment in the manner long used was in pursuance of such an origin, which, in the absence of proof that it was modern, is deemed to have taken place beyond legal memory.

5CPD438
453,
1App Cas
635

In the present case there is nothing improbable in the grant having been in gross. There are instances in the books in which such presumptions as to corporations appear; of which *Mellor* v. *Spateman* (3) furnishes one. The fact that the common is claimed for cattle levant and couchant may be thought to indicate appurtenancy; but it is far from conclusive. Levant and couchant, as pointed out in many cases, see *Carr* v. *Lambert* (4),—is an expression commonly used and understood to express a measure of the number of cattle that may be put in, and it does not necessarily refer to cattle actually fed upon the particular land. There could be no objection to a grant in gross of common for so many cattle as a certain known farm not in the possession of the grantee could sustain by its natural and artificial products with the assistance of the common, which is the description of the number of cattle levant and couchant upon a given place, and is considered certain enough to be granted. The right of common being "exclusive" tends to shew that it was common in gross. All the other evidence in the case goes to shew that the gift was in gross, and not defeated by a grant or release of part. The recognition and repetition of such releases from the early part of the sixteenth century downwards, without any one questioning the right of common, is strong evidence that the right admitted of such severance, as in law the original grant might well have expressly allowed, supposing such an express allowance to be needful in the case of an exclusive right of common in gross.

---

(1) 12 C. B. (N.S.) 91; 31 L. J. (C.P.) 226. 8 Jur N.S. 1064

(2) 4 K. & J. 579; 27 L. J. (Ch.) 761. 4 Jur N S 628

(3) 1 Notes to Wms. Saund. p. 612.

(4) Law Rep. 1 Ex. 168.

We took time to consider the evidence in this case, which we have carefully examined without finding a single circumstance to interfere with the conclusion that a right so long exercised did originate in the legal origin suggested, and that it ought to be sustained. Nor can the plaintiff justly complain, because the person under whom he claims had ample notice of the right at the time of his purchase.

We answer the first question in the affirmative, and give judgment for the defendant.

Judgment for the defendant.

Attorney for plaintiff: *Steele.*

Attorneys for defendant: *H. J. & T. Child.*

1872
July 5.

HENWOOD *v.* HARRISON.

Libel—Privilege—Fair Criticism on a Matter of "public and national Importance."

9 CP [illegible]
1 CPD 184
7 B & S. 4.
2 CPD 216
217

The fair and honest discussion of or comments upon a matter of public interest is in point of law privileged, and is not the subject of an action, unless the plaintiff can establish malice.

The plaintiff, a naval architect, in 1867 submitted to the Admiralty proposals for the conversion of the old wooden line-of-battle ships of the navy into iron-clad turret-ships. His proposals were considered by the Admiralty, and rejected. In September, 1870, the iron-clad turret-ship *Captain* whilst on a cruize capsized and sunk with all hands. This disaster caused great excitement and anxiety in the public mind; and, with a view to explain the circumstances under which the *Captain* had been sent to sea, as well as the general course pursued by the Board with reference to the placing the navy in a proper condition to meet the exigencies of modern naval warfare, a minute was prepared by the first Lord of the Admiralty for presentation to parliament during the approaching session. This minute referred to and criticised the plans of conversion proposed by the plaintiff; and in a note was inserted a letter upon the subject addressed to the Board in September, 1867, by Sir Spencer Robinson, then controller of the navy, which letter contained this passage,—"These plans would have no weight whatever from the known antecedents of their author, but they derived weight from the approval of Mr. Watts, the late chief-constructor of the navy," and concluded by recommending their rejection. The minute was by order of the Lords of the Admiralty printed by the defendant, the Queen's printer; and copies of it were publicly sold by him *before the meeting of parliament.*

At the trial of an action for this alleged libel, the judge,—assuming the letter to be primâ facie libellous, and it being conceded that the publication was without malice,—nonsuited the plaintiff, on the ground that it was a fair criticism upon a matter of public and national importance, and therefore privileged.

Held, by Willes, Byles, and Brett, JJ., that the nonsuit was right.

Held, by Grove, J., that the publication was not privileged as being of public and national importance or interest, within the limits marked by previous decisions; and that it was not in the nature of a fair criticism of matter before the public, or, at all events, that it was not so clearly within the limits of such privilege as to be removed from the consideration of a jury.

The declaration stated that the plaintiff, before the committing by the defendant of the grievances thereinafter mentioned, had made and submitted to the Lords of the Admiralty for their consideration certain proposals for converting wooden line-of-battle ships into sea-going turret-ships, and had also with the said proposals submitted to their Lordships certain plans shewing how the said proposals were to be carried out; and that the defendant falsely and maliciously published of the plaintiff and of his said plans, in the Appendix to a certain Minute with reference to Her Majesty's ship *Captain*, a certain libel in the form of a letter or communication of Sir Spencer Robinson, controller of the navy, to the Board of Admiralty, containing, amongst other things, the false, scandalous, malicious, and defamatory matter following, that is to say, "These plans (meaning the said plans submitted by the plaintiff to the Lords of the Admiralty as aforesaid) would have no weight whatever from the known antecedents of their author (meaning the plaintiff, and meaning that the plaintiff's known antecedents were such as to make his plans of no value), but they derived weight from the approval of Mr. Watts, the late chief constructor of the navy. Your Lordships may, therefore, see fit to send a copy of this correspondence confidentially to that gentleman, in order that he may have the opportunity of offering to your Lordships any explanation which he may consider desirable in regard to it. To Mr. Henwood himself (meaning the plaintiff), I think it only necessary to say that your Lordships have had the whole question re-considered, and are quite satisfied that no satisfactory conversion of the wooden line-of-battle ships can be made on his plan: and I beg leave to submit that he be so informed" (meaning thereby that the said plans so submitted by the plaintiff to the Lords of the Admiralty as aforesaid were worthless).

Plea, not guilty.

The cause was tried before Brett, J., at the sittings at Westminster after Trinity Term, 1871. The plaintiff, who described himself as a naval architect (1), had in the year 1867 submitted to the Admiralty proposals for converting the old wooden line-of-battle ships of the British navy into iron-clad turret-ships,—a scheme which seemed to have received some sanction from Admiral Halstead and Mr. Watts, formerly chief constructor of the navy. After some correspondence between the plaintiff and the Admiralty, and an attentive consideration of his suggestion that his plan should be tested by converting the *Duncan* or the *Gibraltar*, the plaintiff's proposal was rejected.

On the 6th of September, 1870, the iron-clad turret-ship

---

(1) See the plaintiff's evidence stated more fully in the judgment delivered by Willes, J., post, p. 617.

Captain, in consequence, as was surmised, of her faulty construction, capsized and sunk during a cruise, with all hands save one,—her designer Captain Coles being on board. This great national calamity excited a feeling of intense anxiety in the public mind as to the safety of other vessels of a like description: and, with a view to allay that anxiety and to explain the circumstances under which the *Captain* was sent to sea, a Minute was prepared by Mr. Childers, the first Lord of the Admiralty, explanatory of the course which had been pursued by the Board with reference to the re-construction of the navy, for the purpose of its being presented to parliament in the ensuing session. This Minute made reference to and criticised the plan proposed by the plaintiff; and in a note was inserted the letter which was addressed to the Board on the 2nd of September, 1867, by Sir Spencer Robinson, the controller of the navy, which contained the alleged libel.

This minute was printed by the defendant, the Queen's printer, under the direction of the Lords of the Admiralty, and was by him publicly sold on the 30th of November, 1870, before the meeting of parliament.

It was admitted by the plaintiff that the publication by the defendant was without actual malice; but it was insisted that it was an unprivileged circulation of libellous matter, and therefore actionable. On the other hand it was contended that the letter was a fair criticism upon a matter of great national importance, and therefore privileged.

The learned judge nonsuited the plaintiff, on the ground that the publication was in the nature of a fair criticism of a proposal affecting a matter of great national importance, viz. the stability of the navy, and therefore, being bonâ fide and without malice, privileged. And he refused to leave to the jury, though strongly urged to do so, the question whether the letter was relevant to the occasion.

A rule nisi having been obtained for a new trial, on the ground of misdirection,

Huddleston, Q.C. (*The Attorney-General* and *J. O. Griffits* with him), shewed cause. The circumstances under which and with reference to which the publication in question took place were such as to repel the inference of malice, even if the matter contained in Sir Spencer Robinson's letter was of a libellous character. It was of paramount national importance that the public should be informed of the grounds upon which the Lords of the Admiralty acted in the rejection of a plan for the utilization of the old wooden line-of-battle ships. The question whether this constituted a privilege would have been concluded by the decision of the Court of Queen's Bench in *Wason* v. *Walter* (1), if the sale of this Blue Book had taken place after the minute had been presented to Parliament; and the fact that it had been published a little too soon cannot destroy its privileged character. Malice is not to be inferred unless some evidence of it is given: *Harrison* v. *Bush.* (2) And it is for the Court, and not for a jury, to say whether or not the defamatory matter is relevant to the privileged occasion: *Hodgson* v. *Scarlett.* (3)

H. Matthews, Q.C., and *Raymond*, in support of the rule. The letter of Sir Spencer Robinson was, no doubt, a privileged communication by him to the Board of Admiralty, as being a communication made by him in the course of his duty. And, even if the privilege extended to Mr. Childers,—which may well be doubted, for there is no privilege known to the law in any minister or functionary of the Crown, or even in the Crown itself, to libel individuals,—it clearly could not justify the defendant. Until he circulated the minute, there was nothing public. Since the case of *Stockdale* v. *Hansard* (4), it required an Act of Parliament to protect the publication of parliamentary papers. (5) *Wason* v. *Walter* (1), it is conceded, is no judicial decision upon this question: it was the case of a full and fair publication of a debate in parliament respecting the public conduct of the plaintiff, with fair comments thereon. That was privileged on the same ground that reports of proceedings in Courts of justice are privileged: their publication is simply enlarging the area of the audience. That is an intelligible and safe ground upon which to rest the principle. It is said that the reasoning of the judgment in that case covers

---

(1) Law Rep. 4 Q. B. 73.

(2) 5 E. & B. 344; 25 L. J. (Q.B.) 25.

2 Jur NS 90

(3) 1 B. & Ald. 232.

(4) 9 A. & E. 1.

(5) See 3 Vict. c. 9.

1872

HENWOOD
v.
HARRISON.

the privilege contended for on the part of the defendant. It may, however, be observed that the effect of the reasoning of the Lord Chief Justice is, that, as public opinion changes, the law changes with it, and it becomes the duty of the Courts to keep the law up to the level of public opinion. That seems to be the fair and legitimate principle deducible from the propositions enunciated by his Lordship. Here, the plaintiff had not submitted his proposals to the public: he challenged no criticism. If a publication be privileged because it has reference to a matter of national importance, who is to decide as to the degree of importance? Is it the judge or the jury? If it be matter of fact, it must be for the jury; if of law, by what standard is the discretion of the judge to be measured? To constitute it privileged, the communication must be made in the performance of some legal or social duty or obligation, and the party addressed must have an interest in the subject-matter. The cases as to this are too familiar to need citation. Once instance may suffice, viz. that of a report made to the directors of a railway company as to the conduct of a secretary or other employé: *Harris* v. *Thompson*. (1) If this sort of privilege is to be allowed, where is it to stop? The appointment of a judge is matter of great public importance; so the conduct of a joint-stock company; so the conduct of a member of parliament is of great public importance to his constituents: but, if any of these be impugned, are they to be at liberty to justify themselves by the publication of a series of libels? The rule which is here contended for was never suggested in *Stockdale* v. *Hansard* (2), though the defence in that case excited so much interest and was so elaborately considered. If there had been any foundation for it, Lord Truro could hardly have failed to urge it. It was for the jury to say whether or not the criticism was relevant to the occasion: *Beatson* v. *Skene*. (3) The question of libel or no libel should have been left to them.

Cur. adv. vult.

July 5. The Court not being unanimous, the following judgments were pronounced:—

GROVE, J. I regret to have to differ from the rest of the Court.

---

(1) 13 C. B. 333. (2) 9 A. & E. 1.
(3) 5 H. & N. 838; 29 L. J. (Ex.) 430. 6 Jur NS, 780

I have cross-examined myself to the best of my ability; and, as I cannot convince myself that I am wrong, I must yield to my own opinion.

It seems to me that the publication in question is capable of being considered libellous; that it is not privileged as being of public and national importance or interest, within the limits marked by previous decisions; and that it is not in the nature of a fair criticism of matter before the public, or, at all events, that it is not so clearly within the limits of such privilege as to be removed from the consideration of a jury.

As to the first point, it was not contended in argument, nor is it a ground of decision by the Court, that the expressions complained of were incapable of being deemed libellous by a jury. It may be that, taking into consideration the whole publication, a jury might have fairly found a verdict for the defendant; but it appears to me to be a question for them whether the expressions contain such a reflection on the antecedents of the plaintiff, as to his skill or otherwise, as to constitute a libel.

Nearly the whole of the argument proceeded upon the second ground, viz. that the publication was privileged, as being bonâ fide and of public and national importance. In considering this, it is necessary to look to the circumstances under which the alleged libel was published. A minute dated the 30th of November, 1870, was prepared by the first Lord of the Admiralty relating to the loss of the ship *Captain*, for the purpose of being laid before Parliament. To this was appended, inter alia, a *portion* of the correspondence relating to a proposal of the plaintiff to convert wooden line-of-battle ships into armour-plated turret-ships. A letter from Sir Spencer Robinson, controller of the navy, to the Board of Admiralty, forms part of this correspondence, and is the part complained of. I apprehend there is no doubt that this letter to the board is privileged: it is written by an official, on a subject within the scope of his authority, to the board, to which he owes a duty, and which has a corresponding duty, and is admittedly without malice. The question is, has another person, be it Mr. Harrison, the printer and seller, or the first Lord of the Admiralty, a further privilege to lay before the public this privileged communication?

In considering this question, we may assume the matter to be libellous. Has, then, any subject of Her Majesty a right to publish a libel communicated under privilege, if on a subject of national importance or public and general interest, if he do so bonâ fide and without malice? No case was cited in argument, and I am aware of none, according such a privilege. It would vest in the individual a most formidable power, and one likely to lead to the most injurious consequences.

Is, then, the judge who tries the case, subject to the revision of the Court, to be the arbiter in each particular case as to whether the matter complained of is of such national importance and public interest as to be privileged? or is the judicial discretion of the Court limited to such subjects as the law has defined as belonging in this respect to the public domain? and is this publication within such limits?

To carry the judicial discretion to the extent contended for would, I venture humbly to think, vest a new and unconstitutional power in the judges, would refer to their discretion a question of fact and degree incapable of being reduced to rule, and perilous to the proper discharge of their functions. If it exist in English law, a prime minister would have the right to publish opinions received by him as to the qualifications of a candidate or person proposed to fill a high office of state, communicated to him under circumstances of privilege; a Lord Chancellor to publish opinions respecting a barrister proposed as a judge; a chairman of a corporation respecting a director or a secretary; an employer of labour to publish the character of a steward; or a master the character of a servant; provided each of these functionaries respectively acts bonâ fide, and the Court considers the publication of national importance, which in degree all these matters may be and probably are.

I cannot help thinking that it would be a dangerous doctrine to propound, and one far more likely to be injurious than beneficial to the public, if such a view were sanctioned. It would prevent all that freedom of opinion and of intercourse which is necessary for supplying important offices with efficient men, and would lead to personal controversies of a character detrimental to the best interests of the commonwealth.

What is the criterion of decision which a judge would have in trying a case to place before himself in adjudicating upon such subjects? The only one that I can imagine is that argumentatively used by the Court in some of the reported cases, that the advantage to the community outweighs the injury to the individual. This is a most elastic formula, and, taking it alone, the privilege in any particular case could not be affirmed until the question in that case has been decided by the judgment of the House of Lords.

If it is conceded that this is not the law, then, are the proceedings of all the great departments of state, e. g. the Admiralty, the Board of Trade, the Home, Colonial, or Foreign Offices clothed with such immunity that they, their chairmen and puplic officers, or printers employed by them, can publish matter libellous in itself, if the publication is bonâ fide and without malice in the publisher? Here again, I can see no rule by which the limits are to be defined.

By the judgment in *Stockdale* v. *Hansard* (1), a document laid before the House of Commons, and printed and published by its order, was held not privileged; and an Act of Parliament (3 Vict. c. 9), as is well known, was passed to protect the publication of such proceedings.

It was argued in the present case that the loss of the *Captain* was a matter which had created great and general public interest. The foundering of the *Captain* was, no doubt, a public disaster; but so in degree is the wreck of a fishing-boat. Where is the line to be drawn? The condition of the British navy is, no doubt, a matter of national importance and public interest; but so is in degree the condition and construction of vessels used in the coasting trade.

The privilege which the law gives to the correct publication of proceedings in the Courts of law,—and now, since the case of *Wason* v. *Walter* (2), of debates in the Houses of Parliament,—and to fair comments on them, is bounded by certain definite limits assumed to be marked out by the law. There, the individual is not the arbiter. He repeats, in fact, what is already matter belonging to the public; and the law fixes what subjects shall be so open to publication, and which are thenceforth open to comment. Nor is the judge the arbiter: the scope of the privilege is defined.

---

(1) 9 A. & E. 1.

(2) Law Rep. 4 Q. B. 73.

1872

HENWOOD
v.
HARRISON.

The case of *Wason* v. *Walter* (1), though the judgment speaks of the advantage of publicity being given to proceedings of Courts of justice as being so great that the occasional inconvenience to individuals arising from it must yield to the public good, does not, as far as I can see, decide that, wherever that principle may be deemed by the Court to apply, the matter is privileged: it only decides that parliamentary debates, and fair comments on them, are privileged; and it assumes this to be the law, though not previously judicially decided. It relies much on the analogy between reports of proceedings in Courts of justice and of parliamentary proceedings: see pp. 89, 93, 94 of the report. If the doctrine contended for in this case be law, *Wason* v. *Walter* (1) need not have been argued, or, if argued, would have been so on different grounds. The decision there would be the minor premise of which the proposition here is the major; and the statute 3 Vict. c. 9, passed in consequence of the decision in *Stockdale* v. *Hansard* (2), would have been unnecessary.

According to the argument on this head advanced for the defendant, a libel false in fact and most injurious to character would be privileged, if published bonâ fide and without malice, provided the judge and Court consider it of national importance or of public and general interest. No lines of demarcation were indicated by the learned counsel for the defendant, either as affording a guide in any particular case or as denoting what were the public departments privileged.

In the case of *Davison* v. *Duncan* (3), Lord Campbell says, referring to the publication of proceedings in Courts of justice: "The inconveniences which can arise from such a publication are infinitesimally small in comparison with the benefits which result from it. But as yet that privilege has not been extended to public meetings. There was an attempt made so to extend it, which failed; but before that time I never heard the doctrine now put forward contended for in a Court of justice; and it would carry the principle to an alarming extent, which ought not to be permitted without considerable guards and limitations. If this plea be good, a fair and impartial account of what takes place at a

(1) Law Rep. 4 Q. B. 73.

(2) 9 Ad. & E. 1.

(3) 7 E. & B. 229; 26 L. J. (Q.B.) 104.

3 Jur NS 614-5

public meeting may be published, whatever harm it may do, from a county meeting to petition parliament down to a parish vestry meeting. At such meetings there may be a great number of things spoken, which are perfectly relevant, but highly injurious to the character of others; and, if a fair report of such proceedings is justifiable, in what condition would the injured party be, as he would have no opportunity of vindicating his character? We have no right to extend the privilege beyond what is already established. If the legislature should think it right to extend it to certain meetings, it might be very desirable; but that is not for us, sitting here, to consider." And Wightman, J., says (1): "Primâ facie, whoever publishes what is libellous is liable to an action, unless he can shew that it is either true or that the publication is warranted by reason of its being a faithful report of a judicial or it may be of a parliamentary proceeding."

It is not contended that the matter here is privileged as a proceeding in parliament; for, it was not laid on the table of the House of Commons or published by its orders, but was published some time (I believe a month or two) before the meeting of parliament; and matter is not privileged because it is *intended* to be laid before parliament.

Secondly, is the publication of this letter in the nature of fair discussion or criticism on matter before the public, and of such a character that the judge can on this ground remove it from the jury? This question depends to some extent on the one which I have been considering. Assuming that the communications of the plaintiff to the Admiralty were not confidential,—though this is not clear,—this letter does not appear to me to be in the nature of a public discussion. It never need have been published at all. Portions of the correspondence are not published. The plaintiff, or those who agree with him, might have had no opportunity of discussing it; and, if they ultimately have, it is under great disadvantage, and after seriously injurious effects may have been produced. Here, moreover, it is the privileged reporter to the Board who is the critic, and not the publisher.

No doubt the communications of the plaintiff were not marked "private and confidential," and he seems to have published in some other form his plans for ships; but the proposals here were submitted to the consideration of the Board of Admiralty, and can hardly be said to be documents tendered to the public for general discussion. Whatever the plaintiff might have published elsewhere on the subject, it would have been but fair, before treating them as a subject of public criticism, to have informed him that they were to be so treated, and to have given him an opportunity of revising them. But, assuming the plaintiff's proposals were not confidential, and that, in submitting them to the Board, he had submitted them to the public, the letter of Sir Spencer Robinson was so; at least he seems so to regard it in the penultimate paragraph; and, if not privileged as being so far confidential that it is a communication addressed only to the Board to which he writes, this would only make him, if I am right, liable to an action for libel, as the publisher of it.

---

(1) 26 L. J. (Q.B.) at p. 107. 2 Jur NS 615.

Then, can reflections on "the known antecedents of an author" be said by the Court to be in the nature of fair discussion or argumentative controversy? The reference to antecedents can hardly be taken to apply otherwise than to the man, and not to the proposals then made by him, as these would speak for themselves to an expert. Whether it be right to say that the observations on his antecedents are fair, upon a review of his antecedents, seems to me to be a question for the jury. Assuming all the other points against the plaintiff, is the Court which is to decide this question to say, this is public criticism of public matter, and this discussion is fair and is privileged; we, the judges, are of opinion that it is so, and remove it from the jury?

The freedom which is conceded to fair discussion and comment applies, as I understand it, to a discussion of matters duly before the public,—a book submitted to public criticism; a proceeding in a law Court; debates in parliament; the public conduct of public functionaries, of soldiers in the field, &c. A report to a board is not of this nature. If it were, this consequence would follow, that, upon any plan submitted to a board, an official might make bonâ fide a report which is libellous and privileged; then, another official on the board might republish, also bonâ fide, this privileged but otherwise libellous communication, and a third person sell it for profit, and the person injured has no legal remedy. But, even conceding all this, is it not a question for the jury whether the expressions were not what I may call extra viam, whether or not they exceeded the bounds of fair criticism, and were relevant? I cannot bring my mind to think that, in any view of the other questions, this one must not be for the jury.

It was in no wise admitted, but strenuously denied at the bar, that this publication was a fair comment. Indeed, for the counsel for the plaintiff to have admitted that it was, would have been to admit themselves out of Court on their strongest point. Whether the report was faithful and correct, and whether the comments were fair and reasonable, was a question left to the jury in *Wason* v. *Walter* (1); and the Court of Exchequer, in *Beatson* v. *Skene* (2), considered that, where matters of fact were involved, the question of relevancy was for the jury.

Though fully impressed with the probability that I must be wrong in differing from opinions of so much weight, I feel compelled to say that in my judgment this rule should be made absolute.

WILLES, J. This was a rule to set aside a nonsuit, argued before my Brothers Byles, Brett, and Grove, and myself. I proceed to deliver the judgment of the two former and myself.

The action was of libel, brought by the plaintiff, a naval architect, against the Queen's printer, for selling across the counter, in the regular course of business, a "blue book" ordered to be printed in the year 1870 by the Lords of the Admiralty, acting on behalf of Her Majesty, to be presented to parliament in explanation of the conduct of the Board touching the reconstruction of the navy,—a subject to which attention had just then been called by the disaster to Her Majesty's ship *Captain*. In that blue book was contained a criticism of a proposal sent in by the plaintiff on the 17th of April, 1867, to the Admiralty, of what he described as, and what unquestionably was, a matter of national importance, namely, a mode of dealing with wooden ships to fit them by iron plating for the novel requirements of vessels of war, and further explained by a letter of the plaintiff of the 27th of July, 1867 (Blue Book 114), urging the importance of the proposal, and

Ante 607

---

(1) Law Rep. 4 Q. B. 73. (2) 5 H. & N. 838; 29 L. J. (Ex.) 430. 6 Jur. N.S. 780

repeating his request that the proposal should be at once tested by converting the *Duncan* or *Gibraltar* according to his letter of the 17th of April. These proposals were from time to time submitted to the naval advisers of the Admiralty for their consideration, and were objected to, and finally strongly disapproved of by Sir Spencer Robinson, the controller of the navy, in reports set forth in the blue book, and especially in the report in the blue book, pp. 116, 117, and containing, as it is insisted by the plaintiff, libellous strictures upon his experience and capacity to deal with this special subject of re-construction.

This report contained a scientific criticism of the plaintiff's plan, and concluded with the following passage, upon which alone the charge of libel is founded:—"These plans would have no weight whatever from the known antecedents of their author; but they derived weight from the approval of Mr. Watts, the late chief constructor of the navy. Their Lordships may, therefore, see fit to send a copy of the correspondence confidentially to that gentleman, in order that he may have an opportunity of offering to their Lordships any explanations which he may consider desirable with regard to it. To Mr. Henwood himself I think it is only necessary to say that their Lordships have had the whole question reconsidered, and are quite satisfied that no satisfactory conversion of the wooden line-of-battle ships can be made on his plan: and I beg leave to submit that he be so informed." Unless that passage be libellous, there is nothing objectionable in the report. The declaration complains of that passage only; and the innuendo is not of any personal attack upon the plaintiff's character, but simply "meaning that *the said plans* so submitted by the plaintiff to the Lords of the Admiralty as aforesaid *were worthless*."

To determine the force and bearing of this alleged libel, it may be proper to consider the evidence of the plaintiff himself at the trial, giving an account of his qualifications and the circumstances which led to his proposal, in substance as follows:—He was educated as a shipbuilder in the regular way, went to sea to acquire a practical knowledge of the subject, entered into the service of Messrs. Mare & Co., of Blackwall, whom he described as the largest ship-builders in England, and who built ships for foreign countries, and remained in their employment for eight years, during which he became their chief assistant. He then became manager of the Millwall Company, and so remained for five years; and there he had great experience in all classes of iron ships, and had built wooden gun-boats. He was "concerned" there in building the *Northumberland*, the largest iron-clad. He did not design the ships which he was concerned in building. He designed the *Baroda*, of 2000 tons, for the Peninsular and Oriental Steam Ship Company. In 1865, he went into business on his own account as a merchant-ship builder, and built in that trade two or three barges. He had not built any ships himself since he set up in business; but he had superintended the building of two merchant steamers for the Roman government about 1867, for carrying stores and troops, not iron-clads. He had not superintended any others he had been so occupied in designing. He had not designed any ships that had been constructed. Soon after setting up as a merchant-ship builder, he started as a naval architect and consulting ship-builder, and had been consulted by agents of foreign countries,—Portugal, Prussia, and Italy,—who had become acquainted with him at Mare's, but did not build or design anything for them, nor was he paid for the consultations. He was consulted by Captain Coles and by Admiral Halstead. He designed some iron-clad turret-ships for Captain Coles and Admiral Halstead, and was engaged on Admiral Halstead's designs for three years before the trial. In 1866, the idea came into his head of converting the wooden ships of the navy into iron-clad turret-ships, and he submitted his plans to Mr. Watts and Admiral Halstead, who approved of them, and advised their being submitted to Mr. Robert Napier, of Glasgow. In August or September, 1866, he inclosed a general sketch of his proposal to the Admiralty, who applied for further particulars, which were supplied; and, after a correspondence, the proposal was rejected in October, 1866. The plaintiff published his designs to others besides the Admiralty. His general proposal was inserted in the *Engineer* newspaper as a matter of national importance; and it was extensively commented upon by the press in all the daily papers. That discussion led the plaintiff in April, 1867, to renew his application to the Admiralty by a more specific proposal, and to request the Admiralty to try his system by converting Her Majesty's ship the *Duncan* or the *Gibraltar* upon his plan; whereupon the correspondence already mentioned took place, and the alleged libellous report was made. That correspondence ended in a formal rejection of the proposal in December, 1867. The designs were at the Paris Exhibition of 1867.

The proposal to the Admiralty, therefore, was made by a person who may have had considerable experience in shipbuilding, wooden and iron, but not on his own account; who had designed iron ships that had not been constructed, and had much considered iron-clads, but not been practically engaged in designing any that had been constructed; and whose proposal was made upon a subject about which he may have thought a good deal but experimented little or nothing, and as to which it was fairly open to an honest critic without malice to say that the "antecedents" of this gentleman, who is not either a practical builder or even a designer of the class of vessels in question, do not make his opinion upon this particular line of military marine architecture of weight, except so far as they derive it from the approval of those who have had practically to do with such work, like Mr. Watts, the former controller of the navy, and, in the words of the innuendo, that his "plans were worthless."

It was admitted at the trial, and upon the argument before this Court, that the defendant acted in fact bonâ fide, and without malice; and no suggestion was made or evidence given of malice against the plaintiff at the Admiralty or elsewhere; but it was insisted on the part of the plaintiff that the occasion was not a privileged one, and that, in spite of his honesty and the absence of malice, the defendant was nevertheless liable, because the statement complained of was calculated, or might be thought by a jury to be calculated, to throw doubt upon the plaintiff's previous experience in the particular line of naval architecture upon which he assumed to give advice, which doubt (so far as it is expressed) constitutes the whole sting of the expressions complained of in the controller's letter. And the plaintiff insisted that good faith and absence of malice, however they might affect the amount of damages, did not justify or excuse the primâ facie libellous matter.

The learned Judge, Brett, J., however, nonsuited the plaintiff, *not* upon the ground that the defendant was the Queen's printer,

1872

HENWOOD v. HARRISON.

nor that he had acted in the ordinary course of business, *nor* that he had authority from a public department, *nor* upon the ground that the report was to be presented to parliament, and would at all events become public in a few days,—all which palliations would, as was argued, have been insufficient; but upon the ground that every man has a right to discuss freely, so long as he does it honestly and without malice, any subject in which the public are generally interested,—to state his own views and to advance those of others for the consideration of all or any of those who have a common interest in the subject; and that, whilst he does so, he has a privilege attaching to such right of free discussion, of the same character which has been held to attach in numerous instances in which liberty of speech has been allowed upon grounds of public and social convenience, where the speaker or writer and the person or persons addressed have had a duty or interest in common, the existence of which is held to rebut the inference of malice.

Of this class are cases of characters given to servants, either in dismissing them,—*Taylor* v. *Hawkins* (1); *Somerville* v. *Hawkins* (2); *Manby* v. *Witt* (3); or in advising others not to employ them, even though the advice be not asked for,—*Pattison* v. *Jones* (4) per Bayley, J.; *Gardner* v. *Slade* (5); of advice given to another, as to the character of a person with whom marriage was contemplated,—*Todd* v. *Hawkins* (6), per Alderson, B.; of information that a robbery had taken place,—*Kine* v. *Sewell* (7); of a handbill offering a reward for the recovery of bills of exchange, stating that they were suspected of being embezzled by the plaintiff, such handbill being published for the protection of the person liable on the bills, or to secure the conviction of the offender,—*Finden* v. *Westlake* (8); of complaints to public officers of the conduct of persons in their employment,—*Blake* v. *Pilfold* (9); *Woodward* v. *Lander* (10); of fair criticisms of literary or other works,—*Tabart* v. *Tipper* (1), *Fryer* v. *Kinnersley* (2), of places of public resort,—*Dibdin* v. *Swan* (3), or of the persons who perform there,—*Gregory* v. *Duke of Brunswick* (4), or of other proceedings of a character in which the public have an interest,—*Dunne* v. *Anderson.* (5)

---

(1) 16 Q. B. 308; 20 L. J. (Q.B.) 313.

(2) 10 C. B. 583; 20 L. J. (C. P.) 131.

(3) 18 C. B. 544; 25 L. J. (C. P.) 294. 2 Jur. N.S. 1004

(4) 8 B. & C. 578.

(5) 13 Q. B. 796; 18 L. J. (Q.B.) 334.

(6) 8 C. & P. 88.

(7) 3 M. & W. 297.

(8) M. & M. 461, per Tindal, C.J.

(9) 1 M. & Rob. 198, per Taunton, J.

(10) 6 C. & P. 548, per Alderson, B.

1 C P D 754
2 C P D 217

The principle upon which these cases are founded is a universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals. In *Toogood* v. *Spyring* (6), Parke, B., stated the law as follows:—"In general, an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander); and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common protection and welfare of society; and the law has not restricted the right to make them within any narrow limits." In *Harrison* v. *Bush* (7), where an elector of Frome petitioned the Home Secretary, stating that the plaintiff, a magistrate of the borough, had made speeches inciting to a breach of the peace, and praying an inquiry and that the Home Secretary should advise her Majesty to remove the plaintiff from the commission of the peace,—such petition was held to be privileged; and Lord Campbell, expressing the opinion of the Court of Queen's Bench, stated the rule to be that "a communication made bonâ fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which without this privilege would be slanderous and actionable. In the present case, little need be said to shew that the communicator had both an interest and a duty in the subject-matter. And, he added, that duty "cannot be confined to legal duties which may be enforced by indictment, action, or mandamus, but must include moral and social duties of imperfect obligation." And in *Whiteley* v. *Adams* (1), in this Court, Erle, C.J., Williams, J., Keating, J., and Byles, J., acted upon the rule in the terms that "a communication made bonâ fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter which without this interest would be slanderous or actionable."

---

(1) 1 Camp. 350, per Lord Ellenborough.

(2) 15 C. B. (N.S.) 422; 33 L. J. (C.P.) 96. 10 Jur N S. 441

(3) 1 Esp. 28, per Lord Kenyon.

(4) 1 Car. & K. 24, per Tindal, C.J.

(5) R. & M. 287; 3 Bing. 88, per Best, C.J.

(6) 1 C. M. & R. 181.

(7) 5 E. & B. 344; 25 L. J. (Q.B.) 25. 2 Jur NS. 90

It is clear that the privilege so established in respect of duty or interest, however necessary and valuable, must be exercised within the limits which the interest or duty indicates, and that, in many of the instances of privilege to which reference has been made, a public statement to an individual not having any interest in the matter might be held libellous. The statement must be such as the occasion warrants, and made to a person who is interested in receiving it. The mere fact of the presence of a person uninterested has been held to be insufficient to take away the privilege, as in many of the cases as to master and servant; but the statement to a person wholly uninterested would in such case be defamatory,—as, for instance, in the case of a joint-stock company, the publication of a defamatory report of the auditors of the company to the shareholders, whom alone it interested, might be privileged, whilst its general publication might be libellous: *Lawless* v. *Anglo-Egyptian Cotton and Oil Co.* (2) In others of the cases referred to, the publication has been held to be privileged, though made in the form of a handbill, or a statement in a newspaper,

(1) 15 C. B. (N.S.) 392; 33 L. J. (C.P.) 89. 10 Jur NS 470
(2) Law Rep. 4 Q. B. 262.

where the subject was one in which the public had an interest; and this was remarkably the case in *Wason* v. *Walter* (1), where the subject received the most elaborate and satisfactory consideration. In that case, the *Times* newspaper published a debate in the House of Lords touching a petition presented by the plaintiff to the House, charging an eminent judge with misconduct; in the course of which debate the Lord Chancellor commented upon the plaintiff's conduct as false, cowardly, and malicious. The *Times* also published a leading article, in which the conduct of the plaintiff was severely discussed, and characterized as false and malicious. The Lord Chief Justice Cockburn held that the publication of the debate, if honest, bonâ fide, and truthful, was justifiable, and not the subject of a civil action, upon the same or even stronger grounds than those which justify the publication of proceedings in a Court of justice. As to the leading article, which, so to speak, was a statement to the whole world, the Lord Chief Justice held that the occasion was privileged, in the absence of malice; and left it to the jury, in effect, to say whether the article was one which could be ascribed to malicious and sinister motives, or only a fair comment. The Court affirmed the ruling of the Lord Chief Justice upon both points; and upon the latter, as to the publication of the leading article, which, it may be observed, stood in no better or worse position in point of law than a letter addressed or a book sold by one member of the public to another or other members of the public, containing the same language, the judgment was as follows:—"We are of opinion that the direction given to the jury was perfectly correct. The publication of the debate having been justifiable, the jury were properly told that the subject was, for the reasons we have already adverted to, pre-eminently one of public interest" (affecting, as it did, the conduct of one of the public servants of the state, which had been brought by the plaintiff under the notice of parliament), "and therefore one on which public comments and observations might properly be made, and that consequently *the occasion was privileged, in the absence of malice.* As to the latter, the jury were told that they must be satisfied that the article was an honest and fair comment on the facts; in other words, that, in the first place, they must be satisfied that the comments had been made in an honest belief in their justice, but that this was not enough, inasmuch as such belief might originate in the blindness of party zeal, or in personal and political aversion; that a person taking upon himself publicly to criticise the conduct or motives of another, must bring to the test, not only an honest sense of justice, but also a reasonable degree of judgment and moderation, so that the result may be what *a jury should deem,* under the circumstances of the case, *a fair and legitimate criticism on the conduct and motives of the party* who is the object of censure."

---

(1) Law Rep. 4 Q. B. 73.

That decision necessarily involves the conclusion that the fair and honest discussion of or comments upon a matter of public interest is in point of law privileged, and that it is not the subject of an action, unless the plaintiff can establish malice.

The case of *Stockdale* v. *Hansard* (1), so much relied upon in the agrument in this Court to shew that no privilege existed in respect of the discussion of public questions, was thus distinguished in the judgment in *Wason* v. *Walter* (2):—"The position that the order of the House of Commons cannot render lawful what is contrary to law, still less that a resolution of the House can supersede the jurisdiction of a Court of law, under the garb of privilege, can have no application where the question is, not whether the act complained of, being unlawful at law, is rendered lawful by the order of the House, or protected by the assertion of its privilege, but is, independently of such order or assertion of privilege, in itself privileged and lawful." This is obvious when it is considered that, in *Stockdale* v. *Hansard* (1), the question arose upon demurrer, so that the plaintiff was entitled upon the argument to assume that if the case went to trial he could give evidence of actual malice, and the defence set up was an absolute justification, not a privilege, in the absence of actual malice. In *Stockdale* v. *Hansard* (1) the defendant claimed under the authority of one House of Parliament the same absolute exemption from suit which by the general law of the land, upon grounds of public policy, protects a witness or person making an affidavit in the course of an action, or a person speaking or writing in the course of a judicial proceeding, civil or military, from liability even in respect of statements wilfully false and malicious: *Revis* v.

(1) 9 A. & E. 1.

(2) Law Rep, 4 Q. B. at p. 87.

1872

HENWOOD
v.
HARRISON.

Smith (1); *Henderson* v. *Broomhead* (2); *Dawkins* v. *Lord F. Poulet* (3); *Dawkins* v. *Lord Rokeley.* (4)

The defendant in this case, like the defendant in *Wason* v. *Walter* (5), claims no such absolute exemption, but only the privilege of every subject of the realm, to discuss matters of public interest honestly and without actual malice.

The judgment in *Wason* v. *Walter* (5) further recognized the doctrine that the effect of a privileged occasion, the existence of which it is for the judge to determine as matter of law, rebuts the legal inference of malice, and that the plaintiff must fail unless he can prove malice in fact. "In the English law of libel (6), malice is said to be the gist of an action for defamation. And, though it is true that by malice, as necessary to give a cause of action in respect of a defamatory statement, legal and not actual malice is meant, by which legal malice, as explained by Bayley, J., in *Bromage* v. *Prosser* (7), is meant no more than the wrongful intention which the law always presumes as accompanying a wrongful act, without any proof of malice in fact; yet the presumption of law may be rebutted by the circumstances under which the defamatory matter has been uttered or published; and if this should be the case, though the character of the party concerned may have suffered, no right of action will arise. 'The rule,' says Lord Campbell, in the case of *Taylor* v. *Hawkins* (8), is, that, if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of (actual) malice.'"

Where privilege exists, the burthen of proof of actual malice rests upon the person who complains. If there is no evidence of such malice, it is the duty of the judge to direct a nonsuit or a verdict for the defendant: *Somerville* v. *Hawkins* (9); *Spill* v. *Maule.* (10)

In the present case, there was no suggestion and no evidence of malice in any one. The honesty of the publication and the absence of malice were admitted; and there was nothing to be decided

2 Jur. N.S. 614

(1) 18 C. B. 126; 25 L. J. (C.P.) 195.

(2) 4 H. & N. 569; 28 L. J. (Ex.) 360.

(3) Law Rep. 5 Q. B. 94.

(4) Cam. Scac. H. Vac. 1872.

(5) Law Rep. 4 Q. B. 73.

(2) S.C. 5 Jur. N.S. 1175

(6) Law Rep. 4 Q. B. at p. 87.

(7) 4 B. & C. 255.

(8) 16 Q. B. at p. 321.

(9) 10 C. B. 583; 20 L. J. (C.P.) 131.

(10) Law Rep. 4 Ex. 232.

except the question of law, whether *the occasion was privileged.* The learned judge ruled that it was.

In substance, the defendant communicated to another member of the public a statement of the Lords of the Admiralty and the public officers under their control, accounting for their proceedings as to the re-construction of the navy. This statement was made by public servants intrusted by the Crown with the charge of the most important defence of the country, in which every subject of the Queen had an interest of the deepest character; and the statement would have been garbled and incomplete, unless it set forth the very discussion which the plaintiff's own suggestions naturally and necessarily challenged and provoked. It is vainly suggested that those proposals of the plaintiff were private and confidential. There was no stipulation that they should be so considered. They were, moreover, simultaneously published by the plaintiff, and exposed to honest criticism at home and abroad. The plaintiff's proposal was made upon a subject of public interest, to agents of the Crown, who were bound to consider and criticise what was put forward by the plaintiff, if they thought it of sufficient importance to be discussed, which, as against him, it must be taken to have been; and, in the course of that criticism and discussion, the merits of his plans and the previous experience and judgment of the suggester on the subject with which he dealt were relevant subjects of remark. The occasion, therefore, was one in which the alleged libeller and every member of society to whom he might issue the blue book had in common with the plaintiff an interest incomparably greater than that which in so many cases has been held to carry a privilege essential to freedom, and which, in the absence of malice, is an answer to the action.

To prevent any misconstruction of this judgment, it may be proper to say that we agree with the learned judge in attributing no legal weight to the high authority under which the publication took place, nor to the particular object for which the documents were printed, and to add that the jury in civil cases, equally as in criminal cases, are the proper tribunal to determine the question of libel or no libel. This was affirmed by the declaratory Act of 1792 (32 Geo. 2, c. 68), and has been often recognized: see per

Lord Wensleydale, in *Parmiter* v. *Coupland.* (1) But it is not competent for the jury to find that, upon a privileged occasion, relevant remarks made bonâ fide without malice are libellous. As Lord Wensleydale said in the same case (2), "Every subject has a right to comment on the acts of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice or slander." It would be abolishing the law of privileged discussion, and deserting the duty of the Court to decide upon this as upon any other question of law, if we were to hand over the decision of privilege or no privilege to the jury. A jury, according to their individual views of religion or policy, might hold the church, the army, the navy, parliament itself, to be of no national or general importance, or the liberty of the press to be of less consequence than the feelings of a thin-skinned disputant.

In actions of libel, as in other cases where questions of fact, when they arise, are to be decided by the jury, it is for the Court first to determine whether there is any evidence upon which a rational verdict for the affirmant can be founded.

The whole argument to prove that the case ought to have been left to the jury was based upon the primâ facie case of words printed, which a jury might find to be disparaging of the plaintiff in stating that his "plans were worthless." The answer is, that the privileged occasion shifts the burthen, and that, in respect of relevant words, though defamatory, the plaintiff cannot recover without proving malice, which he has failed to do.

If the case had been left to the jury, and they had found for the plaintiff, it would have been the duty of the Court to set aside that verdict.

In this judgment my Brothers Byles and Brett concur. We are of opinion that the learned judge was right in nonsuiting the plaintiff, and that the rule to set aside the nonsuit ought to be discharged.

Rule discharged.

Attorneys for plaintiff: *Wilkinson & Son.*

Attorney for defendant: *A. J. Bristowe.*

(1) 6 M. & W. 105.

(2) 6 M. & W. at p. 108.

ROBERTS *v.* CROWE.

1872
June 10.

8 QB 463
464,-6,
9 QB. 243,-7,

Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 38, 160—*Winding up—Compromise by Transferee of Shares with Liquidator—Liability to Transferror in Respect of future Calls.*

The discharge of a contributory in Class A., under s. 160 of the Companies Act, 1862 (25 & 26 Vict. c. 89), does not release him from his implied contract to indemnify the transferror, who has been placed as a contributory in Class B., the company having been wound up within twelve months after the transfer.

The defendant, a holder of shares at the date of the winding up of a company, being unable to pay the calls in full, an agreement was entered into between him and the liquidator, with the sanction of the Court, by which a certain sum and a transfer of all the contributory's interest in the company were to be accepted by the liquidator in full discharge of all calls, claims, &c., which the company or the liquidator had or thereafter might have against him. The agreement contained a proviso that "nothing herein contained shall in any way prejudice or affect the rights or remedies of the company, or the liquidator or the creditors thereof, against any other contributories of the company, whether as present or past members thereof or otherwise, and that the liability of such members to contribute to the assets of the company shall remain the same as if this agreement had not been made, save only to the extent of the sum paid" under the agreement.

Subsequently, the name of the plaintiff, the former holder of the defendant's shares, was placed upon the list of (Class B.) contributories, as a past member,—the winding up of the company having taken place within twelve months after the registration of the transfer to the defendant:—

Held, that the compromise with the liquidator did not absolve the defendant from his implied contract to indemnify the plaintiff against future calls.

The relation between the transferror and transferee is not that of principal and surety, but one of primary and secondary liability.

Special case for the opinion of the Court, pursuant to a judge's order.

1. In the year 1865, a banking company called Barned's Banking Company, Limited, the capital of which was divided into shares of 50*l.* each, was formed, registered, and incorporated under the Companies Act, 1862 (25 & 26 Vict. c. 89.)

2. The plaintiff was an original holder of 100 shares in the company, and a registered member of the company in respect thereof.

3. Shortly before the 18th of October, 1865, the plaintiff sold twenty of the shares to the defendant; and on the 18th of October, 1865, he executed and delivered to the defendant a transfer

thereof. The defendant also executed such transfer, and procured it to be registered by the company, and his name to be entered on the resister book of the company as a registered member of the company in respect of the twenty shares.

4. At the date of the execution of the transfer, 10*l.* per share only had been paid or called upon the shares of the company.

5. Before the plaintiff had ceased to be a member of the company in respect of the twenty shares for a period of one year, viz. on the 8th of May, 1866, the company was ordered to be wound up under the provisions of the Act; and on the 24th of July the defendant was settled on the list of contributories as a member of the company in respect of 925 shares then held by him, which shares included the twenty shares so purchased by him from the plaintiff; and on the 18th of December, 1866, a call of 40*l.* per share was made on the defendant in respect of all the shares so held by him.

6. Prior to the 5th of June, 1867, the plaintiff was made aware that the defendant would be unable to pay the call in full, and that it was in the contemplation of the official liquidators to place the name of the plaintiff on the list of contributories, Class B. A meeting of persons liable to be placed on that list was held on the 10th of June, 1867, and was attended by a number of persons contributories in Class B.; and it was resolved that the attempt to put past shareholders on the list of contributories, Class B., should be resisted. The plaintiff was not present at the meeting; but he signed an assent to the resolution passed thereat.

7. It was arranged that the liquidators should apply to the Court to place the name of one Andrews on the list of contributories, Class B., and that his case should be treated as a representative case; and accordingly such application was made, and the Master of the Rolls on the 4th of July, 1867, ordered Andrews' name to be placed on the list. (1)

8. In giving judgment, his Honour declared that, "in the event of any arrangement being made between the official liquidators and the shareholders in Class A., he was of opinion that Class B. need not be served; but, at the same time, he should give them or any other class every facility for examining into the fitness or un-

---

(1) See *Andrews' Case*, 4 Eq. 458.

fitness of such compromise, and would hear any representation they might make on the subject."

9. From this judgment Andrews, acting in concert with the plaintiff and others, appealed; but, on the 23rd of July, 1867, the plaintiff received notice that on the 30th of July, 1867, his name would be placed on the list of contributories, Class B., and his name was accordingly placed on that list on that day.

10. On the 21st of November, 1867, the appeal of Andrews was heard before the Lords Justices; and the judgment of the Master of the Rolls was confirmed. (1)

11. In the mean time, negotiations were pending between the defendant and the liquidators, for a compromise; and on the 14th of December, 1867, the Master of the Rolls confirmed an agreement come to between the defendant and the liquidators, whereby the latter agreed to accept 500*l.* in discharge of the defendant's liability in respect of the 925 shares, and of his other indebtedness to the company; but this compromise was not actually completed until the 1st of December, 1868. It was admitted that this agreement was in itself bonâ fide, that the defendant had paid the 500*l.*, and that he had fully performed all the obligations imposed on him by the agreement, except that, although he had always been ready and willing to do so, he had not been required to transfer, surrender, or release his interest in the shares to the liquidators.

12. The plaintiff knew that the defendant had been settled on the list of contributories, Class A., for a large number of shares, and that he was unable to pay the whole of the call, and was trying to compromise with the liquidators; but he never made any inquiry into the fitness or unfitness of such compromise, and no application was made to him on the subject, and he had no notice of the agreement so made by the defendant with the liquidators. (2)

---

(1) Law Rep. 3 Ch. App. 161.

(2) The agreement, a copy of which was set out in an appendix, purported to be made "subject to the conditions and agreements hereinafter contained;" and it professed, in consideration of a sum of 500*l.* and the transfer or surrender and release of the shares and interest of Crowe in the company, to give Crowe "a full and complete discharge from all calls and liabilities, claims and demands whatsoever which the company or the official liquidators thereof had or might thereafter have or be entitled to against Crowe in respect of his being or having been the holder of the said shares or otherwise as a contributory of the company, or in respect of the

13. A claim was afterwards made upon the plaintiff by the liquidators in respect of the twenty shares and eighty other shares which he originally held in the company, and which he had sold and transferred to another person in like manner as he had transferred the twenty shares to the defendant; and upon the eighty shares the then holder thereof had paid to the liquidators 5*l.* per share by way of compromise of his liability, under an agreement similar to that referred to in the preceding paragraph.

14. The liquidators insisted that the plaintiff was liable to the extent of 35*l.* per share in respect of the 100 shares; and a call of that amount was in fact necessary to provide for the liabilities of the company; and proceedings were threatened and commenced by the liquidators to compel the plaintiff to contribute to the extent of 35*l.* per share in respect of the said shares.

15. The plaintiff thereupon, on the 7th of April, 1870, entered into an agreement of compromise with the liquidators, which was in itself bonâ fide, and was sanctioned by the Court, whereby the plaintiff agreed to pay 1500*l.*, being at the rate of 15*l.* per share, in discharge of his liability in respect of the 100 shares, and afterwards, on the 9th of June, 1870, he paid the 1500*l.* The defendant in and prior to 1868, and subsequently, knew that a claim was being made by the liquidators upon the plaintiff in respect of the shares; but he had no notice of and was not a party to this agreement.

16. The plaintiff's share of the necessary costs incurred in resisting his liability to contribute was 20*l.*; and he was further necessarily put to costs and expenses to the amount of 5*l.* in compromising the demand of the liquidators; and he claimed to be indemnified by the defendant and to be paid 300*l.* and interest at

---

2622*l.* 4*s.* 4*d.*," the entire claim upon the shares: and it further contained the following proviso:—"Provided always that nothing herein contained shall in any wise prejudice or affect the right of the said company, or of the liquidator or the creditors thereof, against any other contributories of the said company, whether as present or past members thereof or otherwise; and that the liability of such members to contribute to the assets of the company shall remain the same as if this agreement had not been made, except only to the extent of the said sum of 500*l.*, the amount of compromise so paid as aforesaid."

5*l.* per cent. per annum from the 9th of June, 1870, and 5*l.*, being the proportion of the expenses in respect of the twenty shares sold and transferred by him to the defendant.

17. The Court was to be at liberty to draw any inferences of fact which a jury might and ought to have done.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover against the defendant in respect of the premises.

R. G. Williams (*Manisty, Q.C.*, with him), for the plaintiff. The question is whether a compromise under 25 & 26 Vict. c. 89, s. 160 (1), is a complete discharge of the transferee, or whether he remains liable in respect of calls subsequently made upon the transferror on the winding up of the company within twelve months after the date of the transfer. (2) It is well settled that, upon a sale of shares, there is an implied contract by the purchaser that he will idemnify the seller against future calls; and the judgments of Lords Justices James and Mellish in *Nevill's Case* (3), shew that the acceptance of a compromise by the liquidator from the transferee does not release the transferror. If, then, the trans-

---

(1) Which enacts that, "the liquidators may, with the sanction of the Court, where the company is being wound up by the Court or subject to the supervision of the Court, and with the sanction of an extraordinary resolution of the company where the company is being wound up altogether voluntarily, compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, whether present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and any contributory or alleged contributory, or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets of the company, or the winding up of the company, upon the receipt of such sums, payable at such times, and generally upon such terms as may be agreed upon, with power for the liquidators to take any security for the discharge of such debts or liabilities, or to give complete discharges in respect of all or any such calls, debts, or liabilities."

(2) By s. 38 all "past members" of a company which is being wound up are liable to contribute to the debt and liabilities of the company, subject to the conditions imposed by three subsections,—1. that the person has only ceased to be a member within the year; next, that the debts must have been contracted before he ceased to be a member; 3. that the "present members" are unable to satisfy the contributions required to discharge the debts of the company.

(3) Law Rep. 6 Ch. App. 43.

1872

ROBERTS v. CROWE.

ferror still remains liable to be placed upon the list as a contributory, what is there to release the transferee from his contract of indemnity? The observations of the Master of the Rolls in *Hudson's Case* (1), are not warranted by any provision of the statute, or by any previous case; and they cannot be allowed to outweigh the judgment in *Nevill's Case.* (2) This is not a case of principal and surety. It is more like the case of a lessee, who has a remedy over against an assignee for breaches of covenant for which he has been called upon to pay, and for which the assignee was primarily liable: *Moule* v. *Garrett.* (3)

[WILLES, J., referred to *Deering* v. *Earl Winchilsea.* (4)]

Benjamin (*Baylis* with him), for the defendant. This is a case of the first impression. It does not depend upon any general principle of law, but upon the provisions of the statute as expounded by the decisions regulating the liabilities of contributories. As a general rule, it may be conceded that, where shares are transferred from A. to B., the latter takes them subject to all the liabilities of A. to the company in respect of future calls. That, according to *Humble* v. *Langston* (5) and the cases which have followed it, is the extent of B.'s contract of implied idemnity. By the registration of the transfer in this case to the defendant, the plaintiff was discharged from all liability to pay future calls to the company. But, when he sold these shares, he, as a member of the company, owed debts to the creditors of the company. Against liability in respect of these, the defendant did not contract to indemnify him. The liability of contributories in Class B. is not to the company, but to their own creditors. The contributory is the man who owes to the creditors; the shareholder is the person who owes to the company. Prior to the Act of 1862, there was a statutory liability in the transferee to indemnify the transferror against "all existing and future debts of the company." (6) That was omitted from the Act of 1862.

[WILLES, J. Because it was thought unnecessary.]

The distinction between the liability for debts and the liability

---

(1) Law Rep. 12 Eq. at p. 7.

(2) Law Rep. 6 Ch. App. 43.

(3) Law Rep. 5 Ex. 132; in error, Law Rep. 7 Ex. 101.

(4) 2 B. & P. 270.

(5) 7 M. & W. 517.

(6) 19 & 20 Vict. c. 47, s. 66.

1872

ROBERTS
v.
CROWE.

to calls is much considered in *Oakes* v. *Turquand* (1); see per Lord Chelmsford, p. 350; per Lord Cranworth, p. 362; and per Lord Colonsay, p. 376. The liability of the contributory in Class B. to the debts of the company, in the event of the company becoming insolvent within twelve months after a transfer of the shares, is not one of the liabilities which are involved in the bargain between the buyer and the seller. The defendant's liability is bounded by the four corners of the agreement; the qualifying words "subject to the conditions hereinafter contained" do not amount to a covenant.

[WILLES, J. That was decided in *Wolveridge* v. *Steward* (2), in the Exchequer Chamber, overruling a decision of this Court. (3) The matter was subsequently re-considered in the Court of Exchequer Chamber in Ireland. (4)]

If the plaintiff succeeds in this action, the liquidator will be entitled to say that what he may recover he holds as trustee for him. The relations as between Class A. and Class B. have been considered in several cases: see *Bridger's Case* (5), *Creyke's Case* (6), *Brett's Case* (7), and *Morris's Case.* (8) These cases shew that the liability of a past member is only in respect of debts contracted by the company whilst he was a shareholder. This is also distinctly laid down by the House of Lords in *Helbert* v. *Banner.* (9)

The true interpretation of this statute is that it operates as a kind of special bankruptcy law as between the contributories, the company, and the creditors of the company: and it would be contrary to the spirit and the letter of the Act if the compromise were held not to operate to discharge the defendant from future liability in respect of the shares.

Williams, in reply. When the defendant accepted a transfer of these shares, he took upon himself all the liabilities in respect of them which then rested upon the transferror. One of these liabilities is that imposed by s. 38,—"Every present and past member of the company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company," &c. There is no pretence for saying that this is like a proceeding in bankruptcy. The right of the plaintiff to call upon the defendant for an indemnity is quite independent of any of the provisions of the Act: it arises out of the contract made between them. This is a liability from which the liquidator had no power to discharge the defendant.

---

(1) Law Rep. 2 H. L. 325.

(2) 1 C. & M. 644.

(3) *Steward* v. *Wolveridge,* 9 Bing. 60.

(4) In *M'Creery* v. *Luttrell,* 2 Ir. C. L. Rep. 289.

(5) Law Rep. 4 Ch. App. 266.

(6) Law Rep. 5 Ch. App. 63.

(7) Law Rep. 6 Ch. App. 800.

(8) Law Rep. 7 Ch. App. 200.

(9) Law Rep. 5 H. L. 28.

WILLES, J. This is a nice question arising upon the construction of the Companies Act, 1862 (25 & 26 Vict. c. 89), and the contract entered into under the provisions of that Act. It is a question which does not now arise for the first time. It suggested itself in *Nevill's Case* (1), where one of the Lords Justices (Sir W. M. James) said (2): "It is impossible to read the proviso without seeing that it was principally directed to the transferror. There is nothing unfair in this. The contributory in Class A. cannot be further troubled by the liquidator, but he remains liable to the contributory in Class B., if the latter is called upon to pay the amount which the contributory in Class A. failed to pay." And Lord Justice Mellish impliedly says the same; for, he goes into the effect of the proviso. I do not think that is at all detracted from by the remarks of the Master of the Rolls in *Hudson's Case* (3), deserving as they always are of the highest respect. It may be that the Lords Justices were a little inaccurate in treating it as a case of principal and surety rather than of transferror and transferee, which stands upon a somewhat different footing. Where two persons are equally liable for a debt, and the person who is not in the enjoyment of the property in respect of which the debt arises, and therefore only secondarily liable, is called upon to pay, he shall have an indemnity from the other. That is the substance of the decision in *Nevill's Case* (1), or rather the cause of the decision. What fell from Lord Justice James, therefore, was not a mere extrajudicial statement: and, even if it were, coming from such a source, I should feel myself quite safe in relying upon it as an authority for pronouncing judgment for the plaintiff in this case, leaving the matter, if wrong, to be set right elsewhere.

(1) Law Rep. 6 Ch. App. 43.

(2) Law Rep. 6 Ch. App. at p. 46.

(3) Law Rep. 12 Eq. 1.

Speaking for myself, I adopt it as an authority, because this is a case in which the liability for calls is in the first instance cast upon the transferee, and, on his failure to meet them, then upon the transferror,—the liability of the latter springing from facts existing and known to both parties at the time the contract was made. The contract for the sale of the shares amounts to this,—The transferror wishing to get rid of the shares, and of all liability in respect of future calls upon them (not to the debts, for the company is liable for them), and the transferee being content to take the shares, and to pay all future calls, the latter agrees to accept and the former agrees to part with all his interest in the shares. If the company gets into difficulties, why should the transferror be called upon to contribute, when the transferee has agreed to take all the advantages incident to the shares and to pay the calls? The transferror has a right to keep the purchase-money in his pocket, and to require the transferee to indemnify him against future calls, whether made by the company or by a liquidator. The liability of the transferror in the event of a winding up is exactly analogous to the case of lessee and assignee, the former of whom is liable for breaches of covenant committed by the latter, but, being only secondarily liable, has his remedy over against the person primarily liable, the assignee. That is the case of *Moule* v. *Garrett.* (1) I may also refer to *Deering* v. *Earl Winchilsea* (2), which was the case of a bond given to secure a debt for which the plaintiff was only secondarily liable. That is a principle of law which applies in all cases where one who is only secondarily liable performs (under compulsion of law) an obligation for which another person is primarily liable.

It is said that there are other circumstances in this case which ought to induce the Court to give judgment for the defendant. It is said that the discharge of the transferee under s. 160 of the Companies Act, 1862, is a complete discharge from *all* liability in respect of these shares. According to the view of the Master of the Rolls in *Hudson's Case* (3), that discharge operates only as between the liquidator and the transferee. It could not operate to discharge the latter from any rights which the law gives the transferror as against him. And, moreover, the proviso would prevent it from having any such operation. It has been further said that the proceedings in a winding-up under this Act are like those in bankruptcy, and that it is contrary to the spirit and the letter of the bankrupt law to allow such a liability as this to be cast upon the bankrupt. If that had been intended by the legislature, provisions would have been found in the Companies Act, 1862, regulating the rights and liabilities as between transferrors and transferees, similar to those applicable to the case of principal and surety under the Bankrupt Acts. This proceeding, however, is not at all analogous to a proceeding in bankruptcy. The liquidator has authority to compromise claims for a variety of reasons; amongst others, when he finds a difficulty in establishing a case of liability against the transferee.

---

(1) Law Rep. 5 Ex. 132; in error, Law Rep. 7 Ex. 101.

(2) 2 B. & P. 270.

(3) Law Rep. 12 Eq. 1.

Upon the whole, that which is said by Lord Justice James in *Nevill's Case* (1), and assented to by Lord Justice Mellish, recommends itself to my judgment, and induces me to determine this case in favour of the plaintiff.

KEATING, J. I am of the same opinion. There is nothing unreasonable or unnatural in concluding that, when he takes a transfer of shares, the transferee contemplates the possibility of a state of things which may result in a winding-up of the company, with its usual incidents, one of which is that he may be called upon to recoup the person who was secondarily liable for future calls, but who has by the transferee's default become primarily liable. The effect of the winding-up here, followed by the compromise made by the defendant with the liquidator, was, to make the transferror, who originally was only secondarily liable, become primarily liable. Why should he not be repaid by the person who was primarily liable with him? I agree with my Brother Willes that we could not give judgment for the defendant here without differing entirely from the reasons given by Lord Justice James in *Nevill's Case.* (1) But I feel bound to say that I entirely assent to the conclusion which the Court came to in that case.

WILLES, J. This being a new and a very nice question, we think the plaintiff should be content to take judgment for the

(1) Law Rep. 6 Ch. App. 43.

300*l.*, without interest, and without the 5*l.* the proportion of the expenses.

Judgment for the plaintiff.

Attorneys for plaintiff: *Gregory, Rowcliffes, & Rawle, for Atkinson, Bartlett, & Atkinson, Liverpool.*

Attorneys for defendant: *Gregory, Rowcliffes, & Rawle, for Hull, Stone, & Fletcher, Liverpool.*

July 5.

JESSIE REYNOLDS, APPELLANT; THE LORD OF THE MANOR OF WOODHAM WALTER, IN THE COUNTY OF ESSEX, RESPONDENT.

Copyhold—Compulsory Enfranchisement—Valuation of Lord's Right in Respect of Timber—Basis of Computation of Rent-charge in the Case of a Tenant for Life—In what Cases an Appeal lies.

The lord of a manor has rights in respect of the timber on the copyhold properties, for which rights he was upon a commutation under 4 & 5 Vict. c. 35, and is upon an enfranchisement under 15 & 16 Vict. c. 53 and 21 & 22 Vict. c. 94, entitled to compensation.

Upon an appeal against a decision of the Copyhold Commissioners awarding compensation to the lord, upon a compulsory enfranchisement, in respect of timber growing on the land, if there be any evidence of a special custom entitling the lord to a fine upon the grant of a licence to fell timber, it is the exclusive province of the commissioners to determine, as a question of fact, whether such evidence proved the existence of the custom; s. 8 of 15 & 16 Vict. c. 51, giving an appeal only upon a question of law.

The tenant having upon her admission paid a full fine assessed at two years' improved value of the land,—which admission, according to the custom of the manor, enured as an admission of the tenant in remainder,—no other fine (except on alienation) would become payable to the lord until after the deaths of both tenant for life and tenant in remainder:—

Held, that the valuers, upon a compulsory enfranchisement at the instance of the lord, were not bound to take the fine so paid as the basis of the computation of the rent-charge; nor to state in their award what proportion of the rent-charge should, under s. 28 of 4 & 5 Vict. c. 35, or s. 35 of 15 & 16 Vict. c. 51, be deferred until the next act or event on which a fine would become payable to the lord, or to state such particulars as might enable the commissioners to defer payment of the whole or any part of the rent-charge, so as to "prevent the hardship or injustice which the tenant would otherwise suffer by the compulsory enfranchisement."

But the Court intimated a strong opinion, in point of fact, that it was a case of hardship which the commissioners might and ought by some means to mitigate.

BY direction of the Copyhold Commissioners, pursuant to the 8th section of the Copyhold Act, 1852 (15 & 16 Vict. c. 51), and the

1872

REYNOLDS
v.
WOODHAM
WALTER.

40th section of the Copyhold Act, 1841 (4 & 5 Vict. 35), a case was stated for the opinion of this Court, the material facts of which and arguments of counsel are set out in the judgment of the Court.

The case was argued on the 10th and 12th of February and 27th of May last, by *Hurlstone*, for the tenant, and *Manisty, Q.C.* (*Herschell, Q.C.*, with him), for the lord.

The authorities cited on the part of the tenant were, Co. Litt. 55; Scriven on Copyholds, 5th ed. 293–295; Cook on Copyhold Enfranchisement, 120 et seq.; *Ashmead* v. *Ranger* (1); *Whitechurch* v. *Holworthy* (2); *Reg.* v. *Woodham Walter* (3); *Crisp* v. *Bunbury* (4); *Macdougall* v. *Paterson* (5); *Morisse* v. *Royal British Bank* (6); *Reg.* v. *Tithe Commissioners.* (7)

On the part of the lord, *Doe* d. *Mason* v. *Mason* (8) and *Roe* d. *Bennett* v. *Jeffery* (9) were cited.

[GROVE, J., referred to a note on s. 8 of the Act of 1858 (21 & 22 Vict. c. 94), in Rouse's Manual, 282, ed. 1866.]

Cur. adv. vult.

July 5. The judgment of the Court (Byles, Brett, and Grove, JJ.) was delivered by

BRETT, J. This was a case stated for the opinion of the Court by direction of the Copyhold Commissioners.

The tenant, Jessie Reynolds, was the widow of one Frederick Mansell Reynolds, who had been seised in fee of about 107 acres of agricultural land and about ten acres of wood of copyhold tenure, parcel of the manor of Woodham Walter, in the county of Essex, and who had by his will devised the lands to his wife for life, and after her decease to his daughter, her heirs and assigns, for ever.

On the 30th of September, 1869, the testator being dead, the plaintiff was admitted as tenant, and paid upon her admission a fine of 280*l.*, assessed at two years' improved value of the lands.

---

(1) 1 Ld. Raym. 551.
(2) 4 M. & S. 340.
(3) 10 B. & S. 439.
(4) 8 Bing. 394.
(5) 11 C. B. 755; 21 L. J. (C.P.) 27.
(6) 1 C. B. (N.S.) 67; 26 L. J. (C.P.) 62. 3 Jur. N.S. 137
(7) 14 Q. B. 459.
(8) 3 Wils. 63.
(9) 2 M. & S. 92.

1872

REYNOLDS
v.
WOODHAM
WALTER.

In this manor the admission of a tenant for life is the admission of all tenants in remainder, and there is no special custom; so that, in this case, no fine whatever could be due again until after the death of both tenant for life and tenant in remainder, unless they agreed to alienate. The plaintiff was forty-six years of age, and her daughter was twenty-six. The plaintiff had no interest whatever in the land except her said life interest.

On the 2nd of October, 1869, the lord of the manor commenced proceedings under the Copyhold Acts to compel the tenant to enfranchise the lands. Valuers were duly appointed by the lord and the tenant, and they proceeded to their valuation. The lord claimed to be allowed in the valuation in respect of his interest, as lord, in the timber, and was content that the allowance should be on the basis of his being interested to the extent of one third of the value of the timber. The tenant's valuer disputed this claim, unless and until the Copyhold Commissioners should decide that there was a special custom in the manor entitling the lord to one third of the timber. The lord's valuer estimated the compensation to be paid to the lord at an annual rent-charge of 29*l.* 10*s.*, or a present money payment of 754*l.* 13*s.* 6*d.* The tenant's valuer dissented from this, for several reasons which he gave.

Under the above circumstances, the following questions arose, which the commissioners were requested by the tenant to inquire into, ascertain, and determine: 1. Whether in the said manor there is any special custom which entitles the lord to claim one third part of the timber growing and being in and upon the lands of the said manor. 2. Whether the valuers were not bound to state in their award what proportion of the rent-charge to be paid should be deferred until the next act or event in which a fine would become due to the lord, and also to state such particulars as may enable the commissioners to defer payment of the whole rent-charge, or of any part thereof. 3. Whether the amount of the fine paid on admission of the tenant ought not to form the basis of the computation of the rent-charge to be paid in respect of the enfranchisement.

The commissioners met, and the parties were before them. The commissioners examined the court-rolls, several entries in which were set out in the case. No evidence was adduced on the part of the tenant as to the alleged custom. It was contended on her behalf, that this was a case in which the commissioners were bound to prevent hardship and injustice; that a remedy was provided either by s. 28 of 4 & 5 Vict. c. 35, or by s. 35 of 15 & 16 Vict. c. 51; that, under s. 28, they might defer payment of all or part of the rent-charge until the next act or event in which a fine would become due (but the commissioners would have no jurisdiction to do so unless the valuers first found the facts): and that, if the valuers found those facts, it was imperative on the commissioners to defer the payment. It was contended for the lord that s. 28 of the Act of 1841 never applied to enfranchisements; that, if it did, it was repealed by s. 2 of the Act of 1858; that the remedy, if any, in this case was under s. 35 of the Act of 1852; but that this was not a case in which hardship or injustice would unavoidably result from the compulsory enfranchisement. It was contended on behalf of the tenant, but denied on the part of the lord, that the lands were not capable of improvement after enfranchisement in any way in which they might not be improved while they continued copyhold, and that the tenant would not derive any gain, profit, benefit, or advantage whatever from the compulsory enfranchisement.

The commissioners inquired where the tenant resided, what rent she paid, how many servants she kept, and whether she had any other property, and generally into her circumstances, to assist them in determining whether the case was one in which they ought to suspend the proceedings.

The commissioners decided,—first, that there was the special custom alleged,—secondly, that the valuers were not bound to state the particulars required,—thirdly, that the amount of the fine paid by the plaintiff ought not to form the basis of the computation of the rent-charge,—fourthly, that the evidence which had been laid before them did not establish such a case of special hardship as to justify the suspension of the proceedings under s. 35 of 15 & 16 Vict. c. 51.

The questions for the opinion of the Court were then set out,—1. In case the Court should be of opinion that it is matter of law, whether in the said manor there is any special custom which entitles the lord to claim one third part of the timber, &c.: 2. Whether the valuers are not bound to state what proportion of the rent-charge to be paid should be deferred until the next act or event in which a fine would become payable to the lord, and also to state such particulars as may enable the commissioners to defer payment, &c.: 3. Whether the amount of the fine paid by the plaintiff on admission ought not to form the basis of the rent-charge to be paid in respect of the enfranchisement: 4. In case the Court should be of opinion that it is a matter of law on which the party dissatisfied is entitled to appeal, whether this is a case where any special hardship or injustice would unavoidably result, within the meaning of s. 35 of 15 & 16 Vict. c. 51, and whether the commissioners were bound to suspend the proceedings for enfranchisement.

It was contended before us by Mr. Hurlstone, on behalf of the tenant, as to the first point reserved for the consideration of the Court, that the question whether the alleged custom as to timber was proved was a question of law which this Court must determine, that it was not proved, and that the decision of the commissioners was wrong; that the lord had no property in the timber; that he was, therefore, entitled to no remuneration in respect of it, unless by the custom of the manor he was entitled to a fine in respect of it; and that there was no evidence, or not sufficient evidence to prove such a custom in this case, for that the entries were contradictory, and that modern entries could not be relied on. As to the second point, he argued that the valuers were bound to set forth the particulars mentioned in that second question, by reason of s. 28 of 4 & 5 Vict. c. 35, which section, he said, was compulsory and applicable. The statute 4 & 5 Vict. c. 35, he said, provided machinery for commutation of fines and for voluntary enfranchisement of lands within manors; that, although s. 28 was found in that part of the statute which treated of commutation, and was primarily enacted with regard to commutation, yet that the machinery of it was introduced into the scheme for voluntary enfranchisement by s. 63. He then urged that all the enactments of 4 & 5 Vict. c. 35 applicable to voluntary enfranchisements were made applicable to compulsory enfranchisements by 15 & 16 Vict. c. 51, s. 53. That being so, he said that, although the application of s. 28 to the cases of commutation and of voluntary enfranchisement might be repealed by 21 & 22 Vict. c. 94, s. 2, yet that its application to compulsory enfranchisements was not repealed, because it must be treated as written into the statute 15 & 16 Vict. c. 51. If s. 28 was applicable, he said that it was compulsory, and that the valuers were bound to set forth the particulars mentioned in it. If s. 28 was not applicable, he insisted that the commissioners were bound to act under s. 35 of 15 & 16 Vict. c. 51, because it also was compulsory. As to the third point reserved, Mr. Hurlstone admitted that he could not support the tenant's contention. As to the fourth, he urged that the tenant, being tenant for life only, could not possibly obtain any advantage whatever by the enfranchisement; that, without enfranchisement, she could not have been called upon to pay any other fine than the one she had paid; that, by the enfranchisement, therefore, she escaped no future fine,—nay, more, that she had already paid a fine as for the admission of the tenant in remainder, and was by the enfranchisement virtually made to pay it again; that agricultural land was not more capable of improvement after than before enfranchisement; that she could gain nothing under the circumstances by alienation; that it followed that there was necessarily and inevitably a special hardship in the compulsory enfranchisement; that the commissioners were therefore bound to act as upon such hardship; that they had refused; and that the matter was a question of law, which the Court must now determine.

It was contended by Mr. Manisty on behalf of the lord of the manor, as to the first point reserved, that this Court cannot entertain any question of fact by way of appeal, but only questions of law; that the question whether the custom was proved, was a question of fact; that the only question of law could be whether there was evidence of the custom, and that there was evidence of the custom; that the entries were not contradictory, and, if they were, the tribunal which was to try facts must determine between them. As to the second point, he argued that s. 28 of 4 & 5 Vict. c. 35 was never applicable to enfranchisements at all; that it was applicable only to commutations; that the system of commutation was enacted in that part of 4 & 5 Vict. c. 35 which commences at s. 13; that s. 28 was enacted with regard to that system only; that it was not by any other section made applicable to the scheme of voluntary enfranchisements which commences at

s. 56; that the scheme of compulsory enfranchisement was enacted by 15 & 16 Vict. c. 51, and the whole of such scheme is contained in that statute; that it was true that certain parts of the former statute enacted with regard to voluntary enfranchisement were made applicable to compulsory enfranchisements by reference, but that s. 28, which was not applicable to voluntary enfranchisements, was not made applicable to compulsory enfranchisements; that the system of voluntary enfranchisements carried out by means of a schedule of apportionment is repealed, so that, even if s. 28 were ever applicable to voluntary enfranchisements, as argued, it is repealed. As to the fourth point, he admitted that s. 35 of 15 & 16 Vict. c. 51 was not repealed, and that it was applicable to cases of compulsory enfranchisement; but he urged that the determination of every question arising under that section was the determination of a question of fact, which this Court could not review; and that the section gave a discretionary power to the commissioners, the right or wrong exercise of which the Court could not entertain as a question of law.

Now, as to the first question, we are of opinion that the lord of a manor has rights in respect of the timber on the copyhold properties, for which rights he was upon a commutation, and is upon an enfranchisement, entitled to compensation. We have no doubt that by the general law the lord has such rights; and by s. 36 of 4 & 5 Vict. c. 35 such rights, and the right to compensation in respect of them, are expressly recognized. We are further of opinion that the only question as to a special custom in the manor which we can entertain, is, whether there was evidence of such a special custom. If there was evidence, it was the exclusive province of the commissioners to determine, as a question of fact, whether such evidence proved the existence of the custom. It was urged that there was no evidence, because there was no oral evidence of a tradition in the manor; because the entries relied on were made within the time of legal memory; because the entries relied on were few; and because the entries were contradictory. But we are of opinion that none of these objections can prevail. We think there was evidence of the special custom alleged, and that the finding of the commissioners with regard to it cannot be disturbed.

As to the second question, the answer depends upon a review of the statutes. The first scheme devised with regard to manorial rights is that of "a general commutation," which is to be general as to all and compulsory as to many of the tenants of the manor. That scheme is contained and developed in the earlier sections of 4 & 5 Vict. c. 35. It begins at s. 13 with "a meeting" and "an agreement for a general commutation." Section 14 determines what "that agreement" may be. Section 23 determines the powers of the commissioners over that agreement, and brings the scheme up to the point of that agreement being confirmed and made binding. The following sections shew how that agreement is to be carried into effect. By s. 24 valuers are to be appointed "for the purpose of making such valuations, apportionments, and schedules as shall be required for carrying the said agreement into effect." Sections 25 and 27, and s. 28, which has been so much relied on, and other subsequent sections, shew what are the duties of the valuers. By s. 31 it is seen that all these acts are done for the purpose of forming, and terminate in forming, "a schedule of apportionment." That schedule is then to be *carried into effect*. By s. 32 it is to be confirmed. By s. 33 it is to be deposited for reference. By s. 36 it is to take effect.

The next scheme is that of "a voluntary commutation between the lord of the manor and certain tenants." This need not be general, and is not compulsory on any one. It is contained in s. 52, and is to be by "agreement." There being no occasion for "a schedule of apportionment," it is not required to be made, nor are valuers to be appointed. But "all the provisions hereinbefore contained," it is said, not for making, but "for *carrying into effect* a commutation apportionment made by valuers," and for the deposit thereof, shall be applicable to the case of "a commutation agreed upon."

The next scheme is that of "a voluntary enfranchisement." It commences at s. 56. It may be partial or general, but is not compulsory on any one. It is to be carried out by "a schedule of apportionment." But "*such schedule is not to be made by valuers.*" It is to be specifically agreed upon between the lord and tenants; or, where none such shall have been agreed upon, then by a scheme of apportionment *to be prepared by the steward.* The section then has an enactment in these terms: "And all the provisions hereinbefore contained for *carrying into execution* a commutation apportionment made by valuers shall, so far as the same are capable of application, be deemed and taken to be applicable to the case of an enfranchisement under the provisions herein contained." This enactment cannot apply s. 28 to this scheme of "voluntary enfranchisement;" because s. 28 lays down the duties of valuers in making a schedule of apportionment, but in this scheme there are no valuers; and because s. 28 is not a provision for carrying into execution, but for making "a commutation apportionment made by valuers."

The next scheme was that contained in 15 & 16 Vict. c. 51, viz. "compulsory enfranchisement." It is compulsory as between the lord and any tenant, but is not general as between the lord and all the tenants. The mode of procedure begins at s. 2. It begins by a "notice," and then valuers are appointed. They, by s. 7 and s. 16, are to make "an award" in a certain form. By s. 9 that award is to be confirmed by the commissioners. By s. 11 there is to be a "deed of enfranchisement." By s. 12 "a certificate of charge." By s. 33 there is to be a confirmation of "the award." By s. 34 the effect of such confirmation is to complete the enfranchisement. By s. 35,—a section relied upon in this case,—"it shall be lawful for the commissioners from time to time to suspend any proceedings for the enfranchisement where any special hardship or injustice would unavoidably result from any compulsory proceedings." By s. 53 "all the enactments in the recited Acts contained as to enfranchisements (which, as has been seen, are voluntary enfranchisements,) shall be deemed and taken to apply to enfranchisements under this Act," that is to say, to compulsory enfranchisements. If s. 28 had been made applicable to voluntary enfranchisements, this section would have made it applicable to compulsory enfranchisements: but, inasmuch as we are of opinion that it was not made applicable to voluntary enfranchisements under the former Acts, it follows that it is not made applicable to the compulsory enfranchisements under this Act.

By 21 & 22 Vict. c. 94, a new method of proceeding is devised for effecting compulsory enfranchisement, which is however left to be, as it was before, an enfranchisement, not general, but between the lord and any particular tenant or tenants. By s. 8, the matter may be carried out by "agreement," or, if not, there is to be a "valuation made by a valuer or valuers." By s. 10, upon the agreement between the parties being completed, or upon the valuation being made by the valuer or valuers, the commissioners are to make "an award of enfranchisement," and may confirm the same; and such "confirmed award" shall have the effect of "the deed of enfranchisement" of the former Act. There is no section in this Act by which any of the modes or methods of procedure contained in the former Acts are expressly made applicable to this Act. But, inasmuch as other sections are expressly repealed, and the sections in 15 & 16 Vict. c. 51 defining the duties of valuers are not repealed, it seems to follow that the valuers appointed under this Act must proceed according to the enactments contained in the former Act.

By s. 2 of 21 & 22 Vict. c. 94 are repealed,—first, s. 2 of 15 & 16 Vict. c. 51, i.e. the mode therein laid down for initiating a compulsory enfranchisement,—and, secondly, s. 11, i.e. the deed of enfranchisement. Next are repealed all the provisions of the Copyhold Acts which authorize commutations by "schedules of apportionment." This seems to strike out the whole scheme of compulsory commutation contained in 4 & 5 Vict. c. 35, commencing at s. 13. There are then repealed "all the provisions which authorize commutations by a schedule to be prepared by the steward." This strikes out the voluntary commutations regulated by s. 52 of 4 & 5 Vict. c. 35, to be made between the lord and any twelve or all the tenants of the manor. There are then repealed "all the provisions which authorize enfranchisement by schedule of apportionment." This strikes out the scheme of "voluntary enfranchisement" promulgated in s. 56 of 4 & 5 Vict. c. 35. There is nothing in this Act to introduce s. 28 of 4 & 5 Vict. 35 into the proceedings in a compulsory enfranchisement. We are of opinion, therefore, that it is not applicable to such proceedings. It follows that, even if the enactments in it which are relied on were compulsory on valuers acting under it,—as upon a consideration of the variation of language in the section itself we think they were,—in answer to the second question in the case, we must answer that the valuers, acting in this case under the second part of s. 8 of 21 & 22 Vict. c. 94, were not bound to state in their award what proportion of the rent-charge should be deferred, or such particulars as might enable the commissioners to defer payment of the whole rent-charge, or any part thereof.

As to the fourth question, the answer depends on what is the application to the case of s. 35 of 15 & 16 Vict. c. 51. Upon this point we have felt great difficulty. Taking into account the limited interest of the tenant, the will of the testator, the law in this manor as to the full fine to be paid on the admission of a tenant for life, the full fine paid by the tenant, her consequent immunity from any other fine unless upon an alienation, the very limited benefit that could arise to her from alienation, having regard to the fact that the next in remainder was her daughter whose estate is a fee, the large payment nevertheless to be made by the tenant on the compulsory enfranchisement, and the nature of the land,—we cannot help being strongly of opinion, as matter of fact in this particular case, that the compulsory enfranchisement did impose upon the tenant a very considerable and unavoidable hardship, which might have been mitigated by the commissioners under s. 35, or by some other modification of the terms. We think that the circumstances which we have enumerated are those which ought mainly to be considered; and we are, with deference, of opinion that the circumstances into which the commissioners did inquire, which are set out in the case, are not such as ought to govern, or even to be taken into account. The matter in discussion was a matter of property, and of the value of property as between the lord and the tenant. All that relates to that property must be material; but the arrangement of value as to that property between the lord and tenant, who have different rights regarding it, ought not to be made to depend on circumstances wholly foreign to that property or the rights of either party in it.

If, therefore, we had thought ourselves at liberty to interfere with the finding of the commissioners on the question of hardship in this case, we should have felt obliged to differ from their conclusion. But we are of opinion that the determination of the question whether in any particular case there is or is not any special hardship, must involve the determination of many questions of fact, and is in itself a determination of an inferential fact, and not of a proposition or point of law. We are of opinion, therefore,

1872

REYNOLDS v. WOODHAM WALTER.

that we cannot review the decision of the commissioners, which we however hope they may reconsider. Our answer to the fourth question must be that we are of opinion that the matter is not a matter of law which we can entertain.

Upon the whole case we must give judgment for the lord.

Byles, J. I am a party to the judgment of the Court just read by my Brother Brett. But I go rather further than perhaps he does on one point. I mean the recommendation that the commissioners should take into account the full fine already paid by the tenant for life for her admittance. That fine enured, as against the lord, to the benefit not only of the mother as tenant for life, but of the daughter as tenant in remainder in fee; so that, but for the compulsory enfranchisement, no fine would be due to the lord (except on alienation) till the falling in of two lives.

It seems to me that this state of things is a hardship over which the commissioners have jurisdiction, and they will no doubt exercise their powers to obviate it.

Judgment for the respondent. (1)

Attorney for the tenant: *J. H. Triston.*
Attorneys for the lord: *Freshfields.*

---

(1) Upon the above opinion of the Court being communicated to the Copyhold Commissioners, they expressed their decision thereon in the following terms:—

"The Copyhold Commissioners have had under their careful consideration the whole of the circumstances connected with the enfranchisement, and the proceedings which have been taken therein. They have also given the fullest attention to the remarks of the learned judges who delivered the judgment of the Court of Common Pleas, on the point of hardship to the tenant. But, though anxious on all occasions to pay every deference to an opinion thus expressed, the commissioners cannot lose sight of the fact that upon this board devolves the responsibility of the decision which must be given between the lord of the manor and the tenant of the copyhold sought to be enfranchised. And, having regard to the principle of the Acts, and the facts before them, they do not consider that this is such a case of hardship as would enable them to stop the proceedings for a compulsory enfranchisement; and they have therefore directed the umpire to proceed and make his award."

A rule is now pending in the Queen's Bench for a mandamus commanding the commissioners "to re-hear the application to suspend the proceedings for the enfranchisement, under s. 35 of the Copyhold Act of 1852, excluding the evidence mentioned in the judgment of the Court of Common Pleas."

STANTON v. AUSTIN AND OTHERS.

1872
July 5.

Shipping—Construction of Charterparty—Notice of Ship's Arrival at a particular Dock, and Readiness to receive Cargo.

In an action by a ship-owner against the charterers for not loading a cargo of coals pursuant to a charterparty by the terms of which the owner engaged that the vessel, then in the port of Sunderland, being tight, &c., should with all possible dispatch proceed direct to the South Dock, Sunderland, and there load, in the usual and customary manner, at any one of the collieries the freighters might name, a full cargo of coals, &c., which the freighters bound themselves to ship by a given day, for Calcutta,—the defendants pleaded that they had not any notice of the ship having proceeded to and having arrived at the South Dock, and of her being ready to receive cargo, wherefore they did not nor could load :—

Held, that the allegation in the plea must be treated as an allegation of fact, meaning that by reason of want of notice of the ship's arrival at the dock and being ready to load, the defendants were prevented loading her; and that, so read, the plea was an answer to the action.

THE declaration stated that it was agreed by and between the plaintiff and the defendants that the plaintiff's vessel *Kingsbridge*, then in the port of Sunderland, should with all possible dispatch sail and proceed to the South Dock, Sunderland, and there load a full and complete cargo of coals and coke, say, not less than 1600 tons of coal and 600 tons of coke, and, being so loaded, proceed to Calcutta, viâ the Cape of Good Hope, and there deliver the same for freight payable by the defendants to the plaintiff in that behalf; that by the said charterparty it was amongst other things further agreed as follows, that is to say, "the charterers guarantee that the ship shall be loaded by the 15th of December, provided she is ready to receive cargo by the 6th of that month: Averment, that the vessel sailed and proceeded to the South Dock, Sunderland, aforesaid, and was ready to receive cargo by the 6th of December, and that all conditions were performed and things were done and happened and times elapsed necessary to entitle the plaintiff to have his vessel loaded by the 15th of December by the defendants, and to sue them for the breach thereinafter mentioned: Breach, that the defendants did not load the said vessel by the said 15th of December, nor until a long time afterwards, that is to say, the 21st of December, whereby the plaintiff's vessel was detained at great expense and cost to the plaintiff, that is to say, the cost of maintaining the crew of the said vessel, and certain dock and other charges which the plaintiff thereby had to pay; and the plaintiff was otherwise damnified by reason of the said detention.

Second count, that, in consideration that a certain ship of the plaintiff's called the *Kingsbridge,* then in the port of Sunderland, should with all possible dispatch proceed direct to the South Dock, Sunderland, and there load in the usual and customary manner a full and complete cargo of coals in accordance with a certain charterparty made and entered into by and between the plaintiff and the defendants, the defendants promised the plaintiff, amongst other things, that they would load the said cargo within a reasonable time after the ship should have arrived at the South Dock, and should be ready to receive the cargo: Averment, that the ship did proceed to the South Dock, and all conditions were performed, &c., to entitle the plaintiff to have the defendants load the cargo within a reasonable time as aforesaid, and to sue the defendants for the breach thereinafter mentioned: Breach, that the defendants did not load the cargo within a reasonable time as aforesaid, but made great delay in so doing; whereby the plaintiff suffered damage as in the first count mentioned.

Third count, that it was agreed by charterparty by and between the plaintiff and the defendants as in the first count mentioned: Averment, that the ship was not ready to receive the cargo by the said 6th of December; and thereupon, in consideration that the plaintiff would receive the cargo on board the said vessel in accordance with the terms of the charterparty, except in so far as it was thereby provided, as hereinbefore mentioned, that the ship should be loaded by the 15th of December, the defendants promised the plaintiff, amongst other things, that they would load the cargo within a reasonable time: Averment and breach as in the second count.

Third plea, to the first count, that it was agreed in and by the charterparty that the ship, then in the port of Sunderland, being tight, strong, and then every way fitted and ready for the voyage, should with all possible despatch proceed direct to the South Dock, Sunderland, and there load in the usual and customary manner at any one of the collieries freighters might name, a full and complete cargo of coals and coke, which freighters bound themselves to ship, and, being so loaded, should therewith proceed to Calcutta, and deliver the cargo as in the charterparty provided (the act of God, &c., excepted); and that the defendants had not any notice of the ship having proceeded to and having arrived at the said South Dock, and of her being ready to receive cargo as in the charterparty mentioned; wherefore the defendants did not nor could load, as in the first count complained of.

The sixth and tenth pleas, to the second and third counts respectively, were similar to the third.

Demurrer, on the ground that absence of notice is not material. Joinder.

May 1, 1871. *Sir G. Honyman, Q.C.* (*Watkin Williams* with him), in support of the demurrers, contended that there was no obligation on the plaintiff to give notice to the defendants when the ship was ready to receive cargo; that it was their duty to watch for her; and that their undertaking to load within the time specified in the contract was absolute, and not subject to any condition as to notice. He cited *Harman* v. *Clarke* (1); *Harman* v. *Mant* (2); *Reynolds* v. *Fenton* (3); Selwyn's Nisi Prius, 12th ed. 119, 13th ed. 133.

[BRETT, J., referred to *Erichsen* v. *Barkworth.* (4)]

Baylis, contrà, contended that, as the vessel was at the time of the execution of the charterparty lying in the port of Sunderland, and, being tight, &c., was to proceed to the South Dock, her going there, and in that state, was a matter which was solely within the control and knowledge of the plaintiff, the owner, and therefore notice of her arrival there and readiness to load ought to have been given to the defendants,—the removal of the vessel from the place where she was then lying to the South Dock not being a matter of such public notoriety as that the charterers would be bound to take notice of it, as in the case of an arrival in a port. He cited *Vyse* v. *Wakefield* (5), where the general rule as to when

---

(1) 4 Camp. 159.

(2) 4 Camp. 161.

(3) 4 C. B. 187; 16 L. J. (C.P.) 15.

(4) 3 H. & N. 601; 27 L. J. (Ex.) 472: in error, 3 H. & N. 894; 28 L. J. (Ex.) 95. 5 Jur. N.S. 517

(5) 6 M. & W. 442.

1872

STANTON
v.
AUSTIN.

notice is necessary is considered by Parke, B. (1); *Fairbridge* v. *Pace* (2); and *Makin* v. *Watkinson.* (3)

Sir G. Honyman, Q.C., was heard in reply.

BOVILL, C.J. If the allegation in the pleas that, for want of notice of the ship's having proceeded to the South Dock and being there ready to receive cargo, the defendants were unable to load her, be taken to be an allegation of fact,—which, as at present advised, we incline to think would alone make the pleas good,—we think it would be more convenient that our judgment upon the demurrers should be deferred until after the trial of the issues of fact.

Cur. adv. vult.

The issues of fact were tried before Martin, B., at the Durham Summer Assizes, 1871, when a general verdict was found for the defendants. A new trial was moved for in Michaelmas Term last, but refused.

July 5. The judgment of the Court (Bovill, C.J., and Byles, Smith, and Brett, JJ.) upon the demurrers was delivered by

BOVILL, C.J. The demurrers in this case were argued before the Court in Easter Term, 1871, and judgment was reserved until after the issues in fact had been tried. That has now been done, and a verdict found for the defendants.

It was an action by the shipowner against the charterers for not loading a cargo of coal pursuant to charterparty; and by the terms of the charterparty, as stated in the declaration and the pleas, the vessel was to proceed to the South Dock, Sunderland, and there load in the usual and customary manner at any one of the collieries the freighters (the defendants) might name; and each of the pleas demurred to alleged that the defendants had not any notice of the ship having proceeded to and arrived at the South Dock, and of her being ready to receive cargo, *wherefore the defendants did not nor could load her.*

When the case was argued upon the demurrers, we had no infor-

(1) 6 M. & W. at p. 453.

(2) 1 C. & K. 317.

(3) Law Rep. 6 Ex. 25.

1872

STANTON v. AUSTIN.

mation upon the pleadings as to the course of loading at the South Dock, and a question arose whether the last allegation in the pleas was to be treated as a mere conclusion of law or as an allegation of matter of fact.

Assuming the pleas to be bad without such an allegation of fact, then, in order to support them, it would be necessary to treat the last averment as an allegation of fact, meaning that, without notice from the plaintiff, the defendants would not have fair means of knowing that the ship had arrived and was ready. And, as we should construe the averment in a sense which would support the pleas rather than defeat them, we think they must be considered to contain an allegation in substance that, by reason of want of notice of the ship's arrival and being ready to load, the defendants were prevented loading her.

In that view of the case, we think the pleas are good, and our judgment upon the demurrers must be for the defendants.

Judgment for the defendants.

Attorneys for plaintiff: *Thomas & Hollams.*
Attorneys for defendants: *Torr, Janeway, Tagart, & Co.*

BLOWER *v.* THE GREAT WESTERN RAILWAY COMPANY.

May 28.

Railway Company—Common Carriers of Cattle, &c.—Vicious Animal—Negligence.

8 Q.B. 48
1 C.P.D. 20
— 424
439.442
6 Q.B.D. 55

The plaintiff delivered a bullock to the Great Western Railway Company at D., to be carried to N. In the course of the journey the animal escaped from the truck in which it was placed, and was killed.

In a case stated by a county court judge, it was found that the escape of the bullock was wholly attributable to the efforts and exertions of the animal itself, and not to any negligence on the part of the company, and that the truck was in every respect proper and reasonably sufficient for the conveyance of cattle:—

Held, that, upon this state of facts, the judge ought to have directed a verdict for the defendants,—the company (assuming them to be common carriers of cattle) not being responsible for the consequences of an inherent vice in the thing (or animal) to be carried, which results in its destruction without any negligence on their part.

APPEAL from a decision of the judge of the county court of Monmouthshire.

1. The plaintiff claimed 14*l.* 10*s.*, being the value of a bullock delivered by the plaintiff in December, 1869, to the defendants as carriers for hire, at Dingestow Station, near Monmouth, to be carried to Northampton, and which bullock was not so carried, but was through the negligence of the defendants lost. The plaint also charged a conversion.

2. The case was heard without a jury. The facts were as follows:—On the 2nd of December, 1869, the plaintiff personally brought and delivered to the defendants at the Dingestow Railway Station, for conveyance to Northampton, thirty-three head of cattle (of which the bullock in question was one), at a reduced rate of charge, considerably below the maximum rate which the company are authorized to make by their special Act; and the plaintiff at the same time signed a consignment-note, in the following form:—

"*Cattle, Sheep, and Pigs. Reduced Rate.*

"To the Great Western Railway Company. Dingestow Station, 2nd December, 1869.

"Receive from W. Blower of Wonastow the under-mentioned animals, on the conditions stated below, and at the special reduced charge below the rates authorized by law. To be sent to Northampton Station.

"*Special Conditions.* The loading and unloading is to be performed by the sender, and any assistance voluntarily given by the company's servants to be at the risk of the owner. The company are not to be subject to any risk in the receiving, loading, forwarding, in transit, and unloading; nor to be answerable for any damage actual or consequential arising from suffocation, from being trampled on, bruised, or otherwise injured, from fire or any other cause whatsoever; nor for any consequences arising from over carriage, detention, or delay in or in relation to the conveying of the said animals, however caused.

"The company is not bound to send the animals by any particular train, or to carry or deliver them within any certain or definite time, or in time for any particular market.

"If on the arrival of any cattle or other animals at their destination no one shall be ready to receive the same on behalf of the consignee, the company will, at the discretion of the superintendent of any station, send such animals into yards or other convenient places at the expense and risk of the sender or consignee; and, if not claimed within seven days, the same will be sold to defray expenses and pay charges. In order to guard against disappointment, the public are recommended to give two clear days' notice of their intention to send cattle from any station, so that the company may, if possible, provide trucks; and, to afford time for receiving and loading such cattle and stock, they should be at the station not less than two hours before the departure of the train by which they are intended to be conveyed.

"Charges to be paid by W. Blower, sender.

"Free passes for drovers to take charge of cattle and other animals will be allowed, according to the company's regulations.

"N.B. The conditions cannot be altered or dispensed with by any person whomsoever, and are applicable to the whole distance carried over the Great Western, the Bristol and Exeter, the South Devon, and the South Wales railways, and any other railway or conveyance in connection therewith, or with either of them.

3. The plaintiff admitted that the company, before and at the time of the delivery to them of the cattle, had two rates of charges for the carriage from Dingestow Station to Northampton of cattle of a similar description to those received from the plaintiff, viz. the rate called the reduced rate, which was always charged when the sender signed a consignment-note in the above form, and a higher rate when the sender refused to sign such consignment-note. But it was not proved what the amount of such higher rate was, save that the maximum charge authorized by the company's Act of Parliament would have been nearly twice as much as the plaintiff was charged for the carriage of these cattle.

4. The plaintiff and Lewis, his drover, came with the cattle to Dingestow Station, and with the assistance of the defendants' servants loaded the cattle in four of the company's ordinary cattle-trucks, being trucks ordinarily used by the company for the conveyance of similar cattle along their railway; and, the cattle having been so loaded in the trucks in the proper and usual way, and to the satisfaction of the plaintiff, and the doors of the trucks having been afterwards properly closed and secured, the cattle were despatched on their journey in due course about six o'clock the same evening. The sides of the trucks were formed of boards to the height of about five feet from the floor, and about eighteen inches above the sides there was an iron bar of one and a quarter inch in diameter, and about two feet above the bar there was a strong iron top-rail.

5. Lewis, the drover, accompanied the cattle on the journey; and, for the purpose of enabling him to do so, the plaintiff received a free pass for him from the company; and he travelled in the guard's van in the same train which took the cattle, free of charge, in accordance with the terms of the consignment-note.

6. In the course of the following morning, when the train arrived at the Oxford Road Station, Lewis discovered that the

bullock in question had escaped from the truck in which it had been loaded, and was missing; and its carcase was afterwards found lying on the side of the railway between Dingestow and the Oxford Road Station. The door of the truck remained fastened, and the sides and bars and rails were in proper order, with the exception of an iron bar on the side of the truck in which the bullock in question had been put, which was bent and had some hair sticking to it.

7. Subsequently the carcase was sold by the company for what it would fetch, and it realized 10*s.*, which sum they tendered to the plaintiff before action; but he refused to receive it.

8. It appeared from the evidence, and was found as a fact by the judge, that the death of the bullock was caused solely by its escape from the truck in which it had been loaded, and that it had made its own escape either by clambering over the top rail or by forcing its way between the iron bar and the top rail of the truck; and that its escape was wholly attributable to the efforts and exertions of the animal itself; and that neither the death of the bullock nor its escape from the truck was occasioned by or attributable to the negligence of the company; and, further, that the truck was in every respect proper and reasonably sufficient for the conveyance of the bullock and cattle loaded therein; and that there was no actual negligence whatever on the part of the company or their servants with reference to the bullock, or in the receiving or forwarding the same by them.

9. It was contended on behalf of the defendants that, under these circumstances, they were not liable,—first, because they were not guilty of any negligence, and that the bullock met its death and was lost to the plaintiff under circumstances for which they were not responsible,—secondly, because the escape and loss of the bullock were attributable to the acts and vice of the animal itself and its own peculiar nature, or were caused by the contributory negligence of the drover Lewis, in not properly looking after the bullock in the course of the journey,—and, thirdly, because the cattle were carried at the plaintiff's risk, and the company were protected from liability by the terms and conditions of the consignment-note.

10. For the plaintiff it was contended that the company were

1872

BLOWER
v.
GREAT
WESTERN
RAILWAY CO.

liable, and that the terms and conditions in the consignment-note which were relied on by the company were not just and reasonable, and were therefore not binding on the plaintiff, and did not protect the company.

11. The judge held that the company were common carriers of the beasts, and that the conditions relied on were not just and reasonable, and consequently that the company were liable for the escape and loss of the bullock in question, and were not protected from responsibility for such escape and loss by the terms and conditions of the consignment-note, and accordingly gave judgment in favour of the plaintiff, and directed a verdict for him for 14*l.* 10*s.*, which was admitted to have been the value of the bullock when alive.

The questions for the opinion of the Court were,—1. Whether the company, upon the above facts and finding of the county court judge, were common carriers of the bullock, and liable as such, for its escape and loss,—secondly, whether the company were protected from responsibility for the escape and loss by the terms and conditions contained in the consignment-note.

If the Court should be of opinion that the company were common carriers of the bullock and were liable as aforesaid, and were not protected by the terms and conditions in the consignment-note, the verdict was to stand. But, if the Court should be of opinion that the company were not common carriers nor liable as aforesaid as such, or that they were protected from liability by the consignment-note, then the verdict was to be reduced to 10*s.*, being the value of the carcase of the bullock.

Manisty, Q.C. (*J. Digby* with him), for the defendants. There was no negligence of any sort on the part of the company's servants: the loss of the bullock was the result of its own vice. There are numerous cases to shew that a ship-owner is not responsible for injury to goods arising from some inherent and undisclosed dangerous or destructive quality: *Brass* v. *Maitland* (1); *Hutchinson* v. *Guion.* (2) In Jones on Bailments, 4th ed. App. xxi, it is said: "A carrier may shew in his defence that the goods have perished

(1) 6 E. & B. 470; 26 L. J. (Q.B.) 49. 3 Jur. N.S. 710
(2) 5 C. B. (N.S.) 149; 28 L. J. (C.P.) 63. 4 Jur. N.S. 1143

1872

BLOWER
v.
GREAT
WESTERN
RAILWAY CO.

by some internal defect, without any fault on his part; for, his warranty does not extend to such cases. And if, from the nature of the goods carried, they are liable to peculiar risks, and the carrier takes all reasonable care and uses all proper precautions to prevent injuries, he is excused if they are destroyed in consequence of such risks. Thus, if horses or other animals are carried by water, and in consequence of a storm they break down the partitions between one another, and some are killed by kicking, the carrier will be excused, and the loss will be deemed a loss by perils of the sea:" for which are cited *Gabay* v. *Lloyd* (1) and *Lawrence* v. *Aberdein.* (2) In Angell on Carriers, § 214 a, the same doctrine is laid down, and the same authorities referred to. "And," it is added, "in case of an animal sent by railway, it has been ruled that the company are not liable for an accident arising from the animal's own *viciousness* or want of temper. (3) Such a case would seem to be analogous to the case of the loss of merchandize owing to some inherent defect which caused the destruction of it while in transit." Several American authorities are referred to in a note, amongst them *Clark* v. *Rochester and Syracuse Ry. Co.* (4), where it was ruled that the liability of the company as a common carrier of animals is not in all respects the same as that of a carrier of inanimate property,—that, in the absence of a special agreement, the company is responsible for any injury which can be prevented by foresight, vigilance, and care, though arising from the conduct of the animals, but that he is not an insurer against injuries arising from the nature and propensities of the animals, and which diligent care cannot prevent; and *Hall* v. *Renfro* (5), where Judge Duvall adopts the proposition laid down in Angell on Carriers, that the carrier would not be liable "for any accident arising from the animal's own viciousness or want of temper." The same law is laid down in Redfield on Railways, 3rd ed. sect. xviii, p. 129. *Paxton* v. *North British Ry. Co.* (6) is also an authority to shew that, in the absence of evidence of negligence on the part of the company, they are not responsible. In *Moffat* v. *Great Western Ry. Co.* (1), Keating, J., told the jury that the company were not responsible for accidents of a nature beyond the range of ordinary risks, and that the viciousness of the horse was a matter for their consideration. In *Talley* v. *Great Western Ry. Co.* (2), Willes J., says: "If the passenger packed up articles liable to ignition by friction, and by the shaking of the carriage they caught fire," "he would have no more just reason for complaint against the carrier than if he had upon some false alarm thrown his property out of the carriage window."

---

(1) 3 B. & C. 793.

(2) 5 B & Ald. 107.

(3) Said to have been so ruled by Lord Denman in *Walker* v. *London Railway Co.*, Kingston Spring Assizes, 1843, cited in Walford's Law of Railways, 305.

(4) 4 Kernan, 570.

(5) 3 Metcalfe Ky. 51.

(6) 9 Scotch Ses. Cases, 3rd series, 50.

[KEATING, J. If the viciousness of the animal had been communicated to the defendants, they might have declined to receive it. It would be hard, then, if, not knowing its temper, they were held responsible for not having taken extraordinary precautions to prevent its escaping or injuring itself.]

"The common law liability of common carriers does not apply to cattle at all:" per Martin, B., in *Pardington* v. *South Wales Ry. Co.* (3)

Bosanquet, for the plaintiff, was called upon to answer the first point. The liability of a common carrier is, subject to certain well-known exceptions, to deliver safely goods entrusted to him; and there is no distinction in this respect between cattle and other goods: *Palmer* v. *Grand Junction Ry. Co.* (4); *Carr* v. *Lancashire and Yorkshire Ry. Co.* (5) It may be that, if goods which from their nature are liable to extraordinary danger, or which are imperfectly packed, are delivered to the company without notice, the cases cited would be applicable; but there was no evidence here that the animal was specially vicious; and it is the duty of the company to provide trucks of a description which will preclude the possibility of such an accident as this happening. *Stuart* v. *Crawley* (6) is a strong authority to shew that the company are responsible.

[WILLES, J. That case was distinguished in a recent case in

---

(1) 15 L. T. (N.S.) 630.

(2) Law Rep. 6 C. P. 44, at p. 51.

(3) 1 H. & N. 392; 26 L. J. (Ex.) 105, at p. 108. 2 Jur. N.S. 1211

(4) 4 M. & W. 749.

(5) 7 Ex. 707; 21 L. J. (Ex.) 261.

(6) 2 Stark. 323.

1872

BLOWER
v.
GREAT
WESTERN
RAILWAY CO.

this Court (1) on the ground that there the cord by which the greyhound was fastened was obviously insufficient and unsafe.]

Harrison v. *London and Brighton Ry. Co.* (2), and *Peek* v. *North Staffordshire Ry. Co.* (3), were also referred to.

WILLES, J. This was an action brought in the county court of Monmouthshire against the Great Western Railway Company for the non-delivery of a bullock which was delivered to them at Dingestow Station to be carried by them to Northampton. The bullock was received by the company under the terms of a notice which is assailed by the plaintiff. It is unnecessary to consider whether or not the notice was a reasonable one. The question for our decision is whether the defendants, upon the facts and findings of the county court judge, are liable as common carriers for the loss of this animal. Whether a railway company are common carriers of animals is a question upon which there has been much conflict of opinion, and although there may be difficulties in determining that question, such as induced Lord Wensleydale, in *Carr* v. *Lancashire and Yorkshire Railway Co.* (4) to make the observations which have elicited remarks from some learned judges apparently to the contrary, it may turn out after all to be a mere controversy of words. The question as to their liability may turn on the distinction between accidents which happen by reason of some vice inherent in the animals themselves or disposition producing unruliness or phrensy, and accidents which are not the result of inherent vice or unruliness of the animals themselves. It comes to much the same thing whether we say that one who carries live animals is not liable in the one event but is liable in the other, or that he is not a common carrier of them at all, because there are some accidents other than those falling within the exception of the act of God and the Queen's enemies, for which he is not responsible. By the expression " vice," I do not, of course, mean moral vice in the thing itself or its owner, but only that sort of vice which by its internal development tends to the destruction or the injury of the animal or thing to be carried, and which is likely to lead to such a result. If such a cause of destruction exists and produces that result in the course of the journey, the liability of the carrier is necessarily excluded from the contract between the parties. This becomes more clear when we consider the reason why a common carrrier is liable for a loss though happening without any negligence at all on his part, unless in the case of the act of God or the Queen's enemies. The reason is so well known and so well explained by Lord Wensleydale in *Wyld* v. *Pickford* (1), that it is unnecessary to add anything, or to heap up authorities on the subject. A common carrier is liable as an ordinary bailee for negligence; and he is liable for a loss occasioned by negligence, even though the act of God or of the Queen's enemies conduce to the loss. But he is further liable as an insurer for losses which occur through no negligence on his own part. It is only necessary, therefore, to observe that an insurer is not liable for accidents happening through the inherent vice of the thing insured, but only for such as happen through adventitious causes. This is well explained in Smith's Mercantile Law, 8th ed. 354, where it is said: "The underwriters are not liable for a loss which is necessarily incidental to the property rather than occasioned by adventitious causes, such as loss by worms (2), or rats (3), or the self-ignition of damaged hemp." (4) So, in *Brass* v. *Maitland* (5), goods of a dangerous nature were delivered to a ship-owner to be carried, but were so packed as to conceal their real character, and in consequence of the insufficiency of the packages, other parts of the cargo were injured, and it was held by a majority of the Court of Queen's Bench that an action lay against the shippers. That case was followed by *Hutchinson* v. *Guion* (6) and *Hearne* v. *Garton* (7); and the same law was laid down in *Alston* v. *Herring* (8), with regard to goods causing corruption to themselves. The rule is very accurately laid down to the same effect in Story on Bailments, § 492 *a*, where the authorities are all collected: "Although the rule is thus laid down in general terms at the common law, that the carrier is responsible for all losses not occasioned by the act of God or of the King's enemies; yet it is to be understood in all cases that the rule does not cover any losses not within the exception which arise from the ordinary wear and tear and chafing of the goods in the course of their transportation, or from their ordinary loss, deterioration in quantity or quality in the course of the voyage, or from their inherent natural infirmity and tendency to damage, or which arise from the personal neglect, or wrong, or misconduct of the owner or shipper thereof. Thus, for example, the carrier is not liable for any loss or damage from the ordinary decay or deterioration of oranges or other fruits in the course of the voyage, from their inherent infirmity or nature, or from the ordinary diminution or evaporation of liquids, or the ordinary leakage from the casks in which the liquors are put, in the course of the voyage, or from the spontaneous combustion of goods, or from their tendency to effervescence or acidity, or from their not being properly put up and packed by the owner or shipper; for, the carrier's implied obligations do not extend to such cases." It is clear, therefore, that the key to the correct decision of the question raised in this case is given by considering the defendants as insurers who have not been guilty of negligence. And see Angell on Carriers, § 214 *a;* Redfield on Railways, 3rd ed. 129.

---

(1) *Richardson* v. *North Eastern Railway Co.*, Law Rep. 7 C. P. 75.

(2) 2 B & S. 122; 31 L. J. (Q.B.) 113.
8 Jur NS. 740

9 Jur NS. 964
(3) 10 H. L. 473; 32 L. J. (Q.B.) 241.

(4) 7 Ex. at pp. 712, 713; 21 L. J. (Ex.) 261.

---

(1) 8 M. & W. 443.

(2) *Rohl* v. *Parr*, 1 Esp. 444.

(3) *Hunter* v. *Potts*, 4 Camp. 203.

(4) *Boyd* v. *Dubois*, 3 Camp. 133.

(5) 6 E. & B. 470; 26 L. J. (Q.B.) 49. 2 Jur. N.S. 710

(6) 5 C. B. (N.S.) 149; 28 L. J. (C.P.) 63. 4 Jur. N.S. 1143

(7) 2 E. & E. 66; 28 L. J. (M.C.) 216. 5 Jur. N.S. 648

(8) 11 Ex. 822; 25 L. J. (Ex.) 177.

Was, then, what happened in the course of the journey the result of negligence on the part of the company's servants? or was it attributable to some inherent vice in the bullock which led to its own destruction? The facts found in the case seem to me to be conclusive in favour of the latter view. It is found that the bullock in question was put into a proper and sufficient truck ordinarily used by the company for the conveyance of similar cattle along their railway, and was loaded in the proper and usual way. That could not have been found unless the truck was sufficient to secure the cattle from injury from the ordinary incidents of a railway journey, including fright occasioned by their novel position and passing objects. The company are clearly bound to provide trucks that are sufficient to retain cattle under the ordinary incidents of a railway journey; but their liability in this respect extends no further: *Amies* v. *Stevens.* (1) The case expressly finds that "the truck was in every respect proper and reasonably sufficient for the

---

(1) 1 Stra. 128.

1872

BLOWER
v.
GREAT
WESTERN
RAILWAY CO.

conveyance of the bullock and cattle loaded therein," and that "there was no actual negligence whatever on the part of the company or their servants with reference to the bullock, or in the receiving or forwarding the same by them." Mr. Bosanquet says it is not found that the company might not have provided such trucks that no bullock *could* escape under any circumstances during the journey. The judge finds that the truck was reasonably fit for the conveyance of the animal. We cannot be led away from that finding by a suggestion that some possible form of truck might be devised which would prevent the recurrence of such an accident. I think the finding excludes the notion of negligence on the part of the company, or of the escape of the bullock arising from any other cause than its own inherent vice or restiveness or phrensy; and for such an injury the company are not responsible. I think, therefore, that the judgment should be in favour of the plaintiff for 10*s.* only.

KEATING, J. I am quite of the same opinion. It is found in the strongest terms that the escape of the bullock was wholly attributable to the efforts and exertions of the animal itself, and that its escape was not occasioned by or attributable to the negligence of the company; and, further, that the truck was in every respect proper and reasonably fit for the conveyance of the bullock. It would be extremely difficult, upon that finding, to say that the escape of the animal could fairly be attributable to anything but its own inherent vice, which induced it to make violent exertions to free itself, such as no care or vigilance on the part of the company could have guarded against.

Judgment accordingly, without costs.

Attorney for plaintiff: *Child, for W. C. A. Wilkes, Monmouth.*
Attorneys for defendant: *Young, Maples, Teesdale, Nelson, & Co.*

END OF TRINITY TERM, 1872.

REGULÆ GENERALES.

MICHAELMAS TERM, 1872.

GENERAL RULES

FOR THE EFFECTUAL EXECUTION OF "THE CORRUPT PRACTICES (MUNICIPAL ELECTIONS) ACT, 1872,"

MADE BY

Sir Colin Blackburn, Knight, one of the Justices of the Queen's Bench; Sir Henry Singer Keating, Knight, one of the Justices of the Common Pleas; and Sir Anthony Cleasby, Knight, one of the Barons of the Exchequer; the Judges for the time being on the Rota for the trial of Election Petitions in England, pursuant to the Parliamentary Elections Act, 1868.

I.

The presentation of a Municipal Election Petition shall be made by leaving it at the office of the Master for the time being nominated by the Chief Justice of the Common Pleas, under the Parliamentary Elections Act, 1868, and such Master or his clerk shall (if required) give a receipt, which may be in the following form:—

Received on the   day of   at the Master's Office a petition touching the Election of A. B., alderman, councillor [&c., *as the case may be*] for the borough of   purporting to be signed by [*insert the names of Petitioners*].

C. D., *Master's Clerk.*

With the petition shall also be left a copy thereof for the Master to send to the Town Clerk, pursuant to section 13, subsection 1, of the Municipal Elections Act.

Pickering Statutes

See also R. G. 27 Jany 1875. W.N. 75 [illegible]

II.

A Municipal Election Petition shall contain the following statements:—

1. It shall state the right of the Petitioner or Petitioners to petition within section 13, sub-section 1, of the Act.

2. It shall state the holding and result of the election, and shall briefly state the facts and grounds relied on to sustain the prayer.

III.

The petition shall be divided into paragraphs, each of which, as nearly as may be, shall be confined to a distinct portion of the subject, and every paragraph shall be numbered consecutively, and no costs shall be allowed of drawing or copying any petition not substantially in compliance with this rule, unless otherwise ordered by the Court of Common Pleas or a Judge at Chambers.

IV.

The petition shall conclude with a prayer, as, for instance, that some specified person should be declared duly returned or elected, or that the election should be declared void, or that a return may be enforced (as the case may be), and shall be signed by all the Petitioners.

V.

The following form, or one to the like effect, shall be sufficient:—

In the Common Pleas.

The "Municipal Elections Act, 1872."

Election for [*state the place and office for which election held*] holden on the day of A.D.

The petition of A. of [*or* of A. of , and B. of *as the case may be*] whose names are subscribed.

1. Your Petitioner A. is a person who voted [*or* had a right to vote, *as the case may be*], at the above election [*or* was a candidate at the above election]; and your Petitioner B. [*here state in like manner the right of each Petitioner*].

2. And your Petitioners state that the election was holden on the day of A.D. , when A. B., C. D., and E. F., were candidates, and that A. B. and C. D. have been in the usual manner declared to be duly elected.

3. And your Petitioners say that [*here state the facts and grounds on which the petitioners rely*].

Wherefore your Petitioners pray that it may be determined that the said A. B. was not duly elected, and that the election was void [*or* that the said E. F. was duly elected and ought to have been returned, *or as the case may be.*]

(Signed) A.
B.

VI.

Evidence need not be stated in the petition, but the Court of Common Pleas or a Judge at Chambers may order such particulars as may be necessary to prevent surprise and unnecessary expense, and to insure a fair and effectual trial in the same way as in ordinary proceedings in the Court of Common Pleas, and upon such terms as to costs and otherwise as may be ordered.

VII.

When a Petitioner claims the office for an unsuccessful candidate, alleging that he had a majority of lawful votes, the party complaining of or defending the election shall, six days before the day appointed for trial, deliver to the Master and also at the address, if any given by the Petitioners and Respondent, as the case may be, a list of the votes intended to be objected to, and of the heads of objection to each such vote, and the Master shall allow inspection and office copies of such lists to all parties concerned; and no evidence shall be given against the validity of any vote, nor upon any head of objection not specified in the list, except by leave of the Court of Common Pleas or a Judge at Chambers, upon such terms as to amendment of the list, postponement of the inquiry, and payment of costs, as may be ordered. (1)

See R G 27 Jany
1875 rr 3, 4
[illegible]

VIII.

When the respondent in a petition under the Act complaining of an undue election, and claiming the office for some person, intends to give evidence to prove that the election of such person was undue, pursuant to the 15th section of the Act, sub-section 9, such respondent shall, six days before the day appointed for trial, deliver to the Master, and also at the address, if any given by the

See R G 27 Jany
1875 rr 3, 4
[illegible]

(1) No jurisdiction to extend time for delivery of list Neild v Batty U C 9 C P 104
Order for particulars as to canvassers &c Maude v Lowley U C 9 C P. 165.

Petitioner, a list of the objections to the election upon which he intends to rely, and the Master shall allow inspection and office copies of such lists to all parties concerned; and no evidence shall be given by a Respondent of any objection to the election not specified in the list, except by leave of the Court of Common Pleas or a Judge at Chambers, upon such terms as to amendments of the list, postponement of the inquiry, and payment of costs, as may be ordered.

IX.

With the petition Petitioners shall leave at the office of the Master a writing, signed by them or on their behalf, giving the name of some person entitled to practise as an attorney in the Court of Common Pleas, whom they authorize to act as their agent, or stating that they act for themselves, as the case may be, and in either case giving an address, within three miles from the General Post Office, at which notices addressed to them may be left; and if no such writing be left or address given, then notice of objection to the recognizances, and all other notices and proceedings may be given by sticking up the same at the Master's Office.

X.

Any person elected to any municipal office may at any time after he is elected send or leave at the office of the Master a writing, signed by him or on his behalf, appointing a person entitled to practise as an attorney in the Court of Common Pleas, to act as his agent in case there should be a petition against him, or stating that he intends to act for himself, and in either case giving an address, within three miles from the General Post Office, at which notices may be left; and in default of such writing being left in a week after service of the petition, notices and proceedings may be given and served respectively by sticking up the same at the Master's Office.

XI.

The Master shall keep a book or books at his office in which he shall enter all addresses and the names of agents given under either of the preceding rules, which book shall be open to inspection by any person during office hours.

XII.

The Master shall, upon the presentation of the Petition, forthwith send a copy of the petition to the Town Clerk, pursuant to section 13 of the Act, sub-section 1, and shall therewith send the name of the Petitioner's agent, if any, and of the address, if any, given as prescribed, and also of the name of the Respondent's agent, and the address, if any, given as prescribed, and the Town Clerk shall forthwith publish those particulars along with the petition.

The cost of publication of this and any other matter required to be published by the Town Clerk shall be paid by the Petitioner or person moving in the matter, and shall form part of the general costs of the petition.

XIII.

The time for giving notice of the presentation of a petition and of the nature of the proposed security shall be five days, exclusive of the day of presentation.

XIV.

Where the Respondent has named an agent or given an address, the service of a Municipal Election Petition may be by delivery of it to the agent, or by posting it in a registered letter to the address given at such time that, in the ordinary course of post, it would be delivered within the prescribed time.

In other cases the service must be personal on the Respondent, unless a Judge at Chambers, on an application made to him not later than five days after the petition is presented on affidavit, shewing what has been done, shall be satisfied that all reasonable effort has been made to effect personal service and cause the matter to come to the knowledge of the Respondent, in which case the Judge may order that what has been done shall be considered sufficient service, subject to such conditions as he may think reasonable.

XV.

In case of evasion of service the sticking up a notice in the office of the Master of the petition having been presented, stating the Petitioner, the prayer, and the nature of the proposed security, shall be deemed equivalent to personal service if so ordered by a judge.

XVI.

The deposit of money by way of security for payment of costs, charges, and expenses payable by the petitioner, shall be made by payment into the Bank of England to an account to be opened there by the description of "The Corrupt Practices Municipal Elections Act, 1872, Security Fund," which shall be vested in and drawn upon from time to time by the Chief Justice of the Common Pleas for the time being, for the purposes for which security is required by the said Act, and a bank receipt or certificate for the same shall be forthwith left at the Master's Office.

XVII.

The Master shall file such receipt or certificate, and keep a book open to inspection of all parties concerned, in which shall be entered from time to time the amount and the petition to which it is applicable.

XVIII.

The recognizance as security for costs may be acknowledged before a Judge at Chambers or the Master in town, or a Justice of the Peace in the country.

There may be one recognizance acknowledged by all the sureties, or separate recognizances by one or more, as may be convenient.

XIX.

The recognizance shall contain the name and usual place of abode of each surety, with such sufficient description as shall enable him to be found or ascertained, and may be as follows:—

Be it remembered that on the day of , in the year of our Lord 18 , before me [*name and description*] came A. B., of [*name and description as above prescribed*] and acknowledged himself [*or severally acknowledged themselves*] to owe to our Sovereign Lady the Queen the sum of five hundred pounds [*or the following sums*], (that is to say) the said C. D. the sum of £ , the said E. F. the sum of £ , the said G. H. the sum of £ , and the said J. K. the sum of £ , to be levied on his [*or their respective*] goods and chattels, land and tenements, to the use of our said Sovereign Lady the Queen, her heirs and successors.

The condition of this recognizance is that if [*here insert the names of all the Petitioners, and if more than one, add*, or any of them] shall well and truly pay all costs, charges, and expenses in respect of the Election Petition signed by him [*or* them] relating to the [*here insert the name of the borough*] which shall become payable by the Petitioner [*or* Petitioners, or any of them], under the Corrupt Practices Municipal Elections Act, 1872, to any person or persons, then this recognizance to be void, otherwise to stand in full force.

Signed,
[*Signatures of Sureties.*]

Taken and acknowledged by the above-named [*names of sureties*] on the day of at , before me,

C. D.
A Justice of the Peace [*or as the case may be*].

XX.

The recognizance or recognizances shall be left at the Master's Office, by or on behalf of the Petitioner in like manner as before prescribed for the leaving of a petition forthwith after being acknowledged.

XXI.

The time for giving notice of any objection to a recognizance under the 13th section of the Act, sub-section 4, shall be within five days from the date of service of the notice of the petition and of the nature of the security, exclusive of the day of service.

XXII.

An objection to the recognizance must state the ground or grounds thereof, as that the sureties, or any and which of them, are insufficient, or that a surety is dead, or that he cannot be found, or that a person named in the recognizance has not duly acknowledged the same.

XXIII.

Any objection made to the security shall be heard and decided by the Master, subject to appeal within five days to a Judge, upon summons taken out by either party to declare the security sufficient or insufficient.

XXIV.

Such hearing and decision may be either upon affidavit or personal examination of witnesses or both, as the Master or Judge may think fit.

XXV.

If by order made upon such summons the security be declared sufficient, its sufficiency shall be deemed to be established within the meaning of the 13th section of the said Act, and the petition shall be at issue.

XXVI.

If by order made upon such summons an objection be allowed and the security be declared insufficient, the Master or Judge shall in such order state what amount he deems requisite to make the security sufficient, and the further prescribed time to remove the objection by deposit shall be within five days from the date of the order, not including the day of the date, and such deposit shall be made in the manner already prescribed.

XXVII.

The costs of hearing and deciding the objections made to the security given shall be paid as ordered by the Master or Judge, and in default of such order shall form part of the general costs of the petition.

XXVIII.

The costs of hearing and deciding an objection upon the ground of insufficiency of a surety or sureties, shall be paid by the Petitioner, and a clause to that effect shall be inserted in the order declaring its sufficiency or insufficiency, unless at the time of leaving the recognizance with the Master there be also left with the Master an affidavit of the sufficiency of the surety or sureties sworn by each surety before a Justice of the Peace, which affidavit any Justice of the Peace is hereby authorized to take, or before some person authorized to take affidavits in the Court of Common Pleas, that he is seized or possessed of real or personal estate, or both above what will satisfy his debts, of the clear value of the sum for which he is bound by his recognizance, which affidavit may be as follows:—

In the Common Pleas.

Corrupt Practices Municipal Elections Act, 1872.

I, A. B., of [*as in recognizance*] make oath and say that I am seised or possessed of real [*or* personal] estate above what will satisfy my debts, of the clear value of £ .

Sworn, &c.

XXIX.

The order of the Master for payment of costs shall have the same force as an order made by a Judge, and may be made a rule of the Court of Common Pleas, and enforced in like manner as a Judge's order.

XXX.

The Master shall make out the Municipal Election List. In it he shall insert the name of the agents of the Petitioners, and Respondent, and the addresses to which notices may be sent, if any. The List may be inspected at the Master's Office at any time during office hours, and shall be put up for that purpose upon a notice board appropriated to proceedings under the said Act, and headed "Municipal Election List."

XXXI.

The time of the trial of each Municipal Election Petition shall be fixed by the Election Judges on the rota, or any one of them, who shall signify the same to the Master, and notice thereof shall be given in writing by the Master by sticking notice up in his office, sending one copy by post to the address given by the Petitioner, another to the address given by the Respondent, if any, and a copy by the post to the Town Clerk of the borough to which the petition relates, fifteen days before the day appointed for the trial.

The Town Clerk shall forthwith publish the same in the borough.

XXXII.

The sticking up of the notice of trial at the office of the Master shall be deemed and taken to be notice in the prescribed manner within the meaning of the Act, and such notice shall not be vitiated by any miscarriage of or relating to the copy or copies thereof to be sent as already directed.

XXXIII.

The notice of trial may be in the following form:—

Corrupt Practices Municipal Election Act, 1872.

Election Petition of borough of .

Take notice, that the above petition [*or* petitions] will be tried at on the day of and on such other subsequent days as may be needful.

Dated the day of

Signed by order,
A. B.,
The Master appointed under the above Act.

XXXIV.

A Judge may from time to time, by order made upon the application of a party to the petition, or by notice in such form as the Judge may direct to be sent to the Town Clerk, postpone the beginning of the trial to such day as he may name, and such notice when received shall be forthwith made public by the Town Clerk.

XXXV.

In the event of the Barrister to whom the trial of the petition is assigned not having arrived at the time appointed for the trial, or to which the trial is postponed, the commencement of the trial shall ipso facto stand adjourned to the ensuing day, and so from day to day.

XXXVI.

No formal adjournment of the Court for the trial of a Municipal Election Petition shall be necessary, but the trial is to be deemed adjourned, and may be continued from day to day until the inquiry is concluded.

XXXVII.

The application to state a special case may be made by Rule in the Court of Common Pleas when sitting, or by a summons before a Judge at Chambers, upon hearing the parties.

XXXVIII.

The title of the Court held for the trial of a Municipal Election Petition, may be as follows :—

Court for the trial of a Municipal Election Petition for the borough of [*or* *as may be*] between , Petitioner, and , Respondent.

And it shall be sufficient so to entitle all proceedings in that Court.

XXXIX.

An officer shall be appointed for each Court for the trial of a Municipal Election Petition by the Election Judges, at the time that they assign the petition to the Barrister; such officer shall attend at the trial in like manner as the Clerks of Assize and of Arraigns attend at the Assizes.

Such officer may be called the Registrar of that Court. He, by himself, or in case of need, his sufficient deputy, shall perform all the functions incident to the officer of a Court of Record, and also such duties as may be prescribed to him.

XL.

The reasonable costs of any witness shall be ascertained by the Registrar of the Court, and the certificate allowing them shall be under his hand, unless the Court shall otherwise order.

XLI.

The order of the Court to compel the attendance of a person as a witness may be in the following form :—

Court for the trial of a Municipal Election Petition for [*complete the title of the Court*] the day of .

To A. B. [*describe the person*] You are hereby required to attend before the above Court at [*place*] on day of at the hour of [*or* forthwith, *as the case may be*], to be examined as a witness in the matter of the said petition, and to attend the said Court until your examination shall have been completed.

As witness my hand,

A. B.

The Barrister to whom the trial of the
said petition is assigned.

XLII.

In the event of its being necessary to commit any person for contempt, the warrant may be as follows:—

At a Court holden on at for the trial of a Municipal Election Petition for the borough of before A. B., one of the Barristers appointed for the trial of Municipal Election Petitions, pursuant to "The Corrupt Practices Municipal Elections Act, 1872."

Whereas C. D. has this day been guilty, and is by the said Court adjudged to be guilty, of a contempt thereof. The said Court does therefore sentence the said C. D. for his said contempt to be imprisoned in the gaol for calendar months [*or as may be*], and to pay to our Lady the Queen a fine of £ , and to be further imprisoned in the said gaol until the said fine be paid, and the Court further orders that the Sheriff of the borough [*if any, or as the case may be*], and all constables and officers of the peace of any county, borough, or place where the said C. D. may be found, shall take the said C. D. into custody and convey him to the said gaol, and there deliver him into the custody of the gaoler thereof, to undergo his said sentence; and the Court further orders the said gaoler to receive the said C. D. into his custody, and that he shall be detained in the said gaol in pursuance of the said sentence.

A. B.

Signed the day of

A. B.

XLIII.

Such warrant may be made out and directed to the Sheriff or other person having the execution of process of the Superior Courts as the case may be, and to all constables and officers of the peace of the county, borough, or place where the person adjudged guilty of contempt may be found, and such warrant shall be sufficient without further particularity, and shall and may be executed by the persons to whom it is directed or any or either of them.

XLIV.

All interlocutory questions and matters, except as to the sufficiency of the security, shall be heard and disposed of before a Judge who shall have the same control over the proceedings under the Corrupt Practices Municipal Elections Act, 1872, as a Judge at Chambers in the ordinary proceedings of the Superior Courts, and such questions and matters shall be heard and disposed of then by any Judge at Chambers.

XLV.

Notice of application for leave to withdraw a petition shall be in writing and signed by the Petitioners or their agent.

It shall state the ground on which the application is intended to be supported.

The following form shall be sufficient:—

Corrupt Practices Municipal Elections Act, 1872.

Borough of Petition of [*state Petitioners*] presented day of .

The Petitioner proposes to apply to withdraw his Petition upon the following ground [*here state the ground*], and prays that a day may be appointed for hearing his application. Dated this day of

(Signed)

XLVI.

The notice of application for leave to withdraw shall be left at the Master's Office.

XLVII.

A copy of such notice of the intention of the Petitioner to apply for leave to withdraw his petition shall be given by the Petitioner to the Respondent, and to the Town Clerk, who shall make it public in the borough to which it relates, and shall be forthwith published by the Petitioner in at least one newspaper circulating in the place.

The following may be the form of such notice:—

Corrupt Practices Municipal Elections Act, 1872.

In the Election Petition for , in which is Petitioner and Respondent.

Notice is hereby given, that the above Petitioner has on the day of lodged at the Master's Office notice of an application to withdraw the petition, of which notice the following is a copy [*set it out.*]

And take notice that by the rule made by the Judges, any person who might have been a Petitioner in respect of the said election may, within five days after publication by the Town Clerk of this notice, give notice in writing of his intention on the hearing to apply for leave to be substituted as a Petitioner.

(Signed)

XLVIII.

Any person who might have been a Petitioner in respect of the election to which the petition relates, may, within five days after such notice is published by the Returning Officer, give notice, in writing, signed by him or on his behalf, to the Master, of his intention to apply at the hearing to be substituted for the Petitioner, but the want of such notice shall not defeat such application, if in fact made at the hearing.

XLIX.

The time and place for hearing the application shall be fixed by a Judge, and whether before the Court of Common Pleas, or before a Judge, as he may deem advisable, but shall not be less than a week after the notice of the intention to apply has been given to the Master as hereinbefore provided, and notice of the time and place appointed for the hearing shall be given to such person or persons, if any, as shall have given notice to the Master of an intention to apply to be substituted as Petitioners, and otherwise in such manner and at such time as the Judge directs.

L.

Notice of abatement of a petition, by death of the Petitioner or surviving Petitioner, under section 17, sub-section 5, of the said Act, shall be given by the party or person interested in the same manner as a notice of an application to withdraw a petition, and the time within which application may be made to the Court of Common Pleas or a Judge at Chambers, by motion or summons at Chambers, to be substituted as a Petitioner, shall be one calendar month, or such further time as upon consideration of any special circumstances the Court of Common Pleas or a Judge at Chambers may allow.

LI.

If the Respondent dies, any person entitled to be a Petitioner under the Act in respect of the election to which the petition relates, may give notice of the fact in the borough by causing such notice to be published in at least one newspaper circulating therein, if any, and by leaving a copy of such notice signed by him or on his behalf with the Town Clerk, and a like copy with the Master.

LII.

The manner and time of the Respondent's giving notice that he does not intend to oppose the petition, shall be by leaving notice thereof in writing at the office of the Master signed by the Respondents six days before the day appointed for trial exclusive of the day of leaving such notice.

LIII.

Upon such notice being left at the Master's Office, the Master shall forthwith send a copy thereof by the post to the Petitioner or his Agent, and to the Town Clerk, who shall cause the same to be published in the borough.

LIV.

The time for applying to be admitted as a Respondent in either of the events mentioned in the 18th section of the Act shall be within ten days after such notice is given as hereinbefore directed, or such further time as the Court of Common Pleas or a Judge at Chambers may allow.

LV.

Costs shall be taxed by the Master, or at his request by any Master of a Superior Court, upon the Rule of Court or Judge's order by which the costs are payable, and costs when taxed may be recovered by execution issued upon the Rule of Court ordering them to be paid; or, if payable by the order of a Judge, then by making such order a Rule of Court in the ordinary way, and issuing execution upon such rule against the person by whom the costs are ordered to be paid, or in case there be money in the bank available for the purpose, then to the extent of such money by order of the Chief Justice of the Common Pleas for the time being, upon a duplicate of the Rule of Court. (y)

The office fees payable for inspection, office copies, enrolment, and other proceedings under the Act and these rules, shall be the same as those payable, if any, for like proceedings according to the present practice of the Court of Common Pleas.

LVI.

An Agent employed for the Petitioner or Respondent shall forth-

(y) To recover the costs the order of the Commissioners must 1st be made a rule of Ct. for exn. before the entry of the order on the petn. by the Respt. is suffd. Pease v Hawthorne [illegible] with leave written notice at the office of the Master, of his appointment to act as such Agent, and service of notices and proceedings upon such Agent shall be sufficient for all purposes.

LVII.

No proceeding under the Corrupt Practices Municipal Elections Act, 1872, shall be defeated by any formal objection.

LVIII.

Any rule made or to be made in pursuance of the Act, if made in term time shall be published by being read by the Master in the Court of Common Pleas, and if made out of term by a copy thereof being put up at the Master's Office.

Dated the 20th day of November, 1872.

Colin Blackburn,
H. S. Keating,
A. Cleasby,

The Judges for the time being on the Rota for the trial of Election Petitions under the provisions of the Parliamentary Elections Act, 1868.

INDEX.

ACCEPTANCE—Goods sold by sample - 438
See Sale by Sample.

ACTION—Remoteness of damage - - 253
See Proximate Cause of Injury.

ADDING PLAINTIFF—*Practice—Amendment—Common Law Procedure Act*, 1860 (23 & 24 *Vict. c.* 126), *s.* 19.] A declaration contained two counts:—the first was for damages for breach of an agreement whereby the plaintiff let certain furniture to the defendant; and the second was for money awarded by a valuer to be paid by the defendant to the plaintiff for damage done by the defendant to the furniture. The agreement in the first count was made by C., trustee for the plaintiff (who was then a married woman), with the defendant, and the plaintiff was not a party to it; but she was a party to the submission to arbitration on which the second count was founded, and C. was not. The plaintiff having obtained an order by the Master, under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 34, to add C. as a plaintiff:—*Held*, that the Master had power to make the order, and that he had properly exercised his discretion in making it. De Gendre *v.* Bogardus - 409

ADDITION OF DEPONENT—Affidavit **Ex. Ch. 77**
See Waiver of Irregularity.

ADJUDICATION—Bankruptcy—Evidence - 300
See Bankruptcy Jurisdiction.

ADMIRALTY JURISDICTION—County court 290
See County Court Jurisdiction.

AFFIDAVIT—Irregularity—Waiver **Ex. Ch. 77**
See Waiver of Irregularity.

AGENT—Custom of market - **Ex. Ch. 84**
See Custom of Market.

ALLOTTEE OF LAND—Freehold interest - 202
See Vote for Parliament. 6.

AMENDMENT—Adding plaintiff - - 419
See Adding Plaintiff.

—— Description of qualification 143, 150, 163
See Vote for Parliament. 1, 2, 10.

ANIMAL—Carrier—Inherent vice - - 655
See Carrier of Animals.

APPEAL—Building Act - - - 386
See Surveyor's Fee.

ARBITRATION—Broker - 82, **Ex. Ch. 525**
See Arbitrator.

ARBITRATOR—*Broker made Referee to determine whether or not Goods are of the Quality contracted for.*] The defendant, as broker, made a contract for the plaintiff, the seller, as follows:—"Oct. 26, 1869. Sold by order and for account of Mr. D. P., to my principals, Messrs. S. H. & Son, to arrive, 500 tons Black Smyrna raisins—1869 growth—fair average quality in opinion of selling broker. To be delivered here in London at 22*s.* per cwt. —D. pd. — Shipment November or December, 1869," &c.:—*Held*, by the Exchequer Chamber, —affirming the judgment of the Court of Common Pleas,—that the defendant was employed as a sort of arbitrator to determine between the parties any difference which might arise as to the quality of the raisins tendered in fulfilment of the contract; and, consequently, that he was not liable to an action for failing to exercise reasonable care and skill in coming to a decision,—he having acted bonâ fide and to the best of his judgment. Pappa *v.* Rose - - 32, **Ex. Ch.** 525

ARRIVAL, NOTICE OF—Ship - - 651
See Notice of Ship's Arrival.

ASSENT OF LANDLORD—Encroachment - 1
See Encroachment.

ASSESSMENT OF COMPENSATION - 18
See Compensation under Lands Clauses Act.

ASSIGNMENT OF LEASE—Partner - 505
See Government not to assign.

ASYLUM, LUNATIC—Guardians - - 366
See Lunatic.

ATTORNEY—Action without authority—Fraud
See Liability incurred by Fraud. [353

AUTHORITY—Directors of company - 43
See Directors' Authority.

AVERAGE—Foreign statement - - 481
See Foreign Average Statement.

BAILEE—Cab-owner - - - - 272
See Cab-owner.

—— Negligence—Evidence - - 78
See Evidence of Negligence.

BAILMENT IN TRUST—*Policy of Fire Insurance—Insurable Interest—"Merchandise in Trust or on Commission for which the Assured are responsible"—Loss.*] A policy of fire insurance expressed the insurance to be on "merchandise the

BAILMENT IN TRUST—*continued.*

assured's own, in trust or on commission for which they are responsible" in or on certain specified warehouses, vaults, wharves, &c. Whilst the policy was in force certain chests of tea, on a wharf included in the policy, were destroyed by fire. These teas had been deposited in bond by the importer with the wharfinger: the assured had purchased them from the importer, and the warrants had been indorsed in blank by him to the assured. Before the fire occurred the assured had resold the teas in specified chests to customers, and had been paid for them; they held, however, the warrants on behalf of the customers, but merely for the convenience of paying, if required, the charges necessary for clearing the teas payable by such customers:—*Held*, that the policy applied only to goods belonging to the assured, or for which they were responsible, and the property in the teas having, at the time of the fire, passed to the purchasers, they were then at the purchasers' risk, and were consequently not covered by the policy. The North British and Mercantile Insurance Company *v.* Moffatt - - 25

BANKRUPTCY—Composition—Tender 519
See Composition.

—— County court jurisdiction - - 300
See Bankruptcy Jurisdiction.

—— Creditor's deed - - - - 9
See Covenant not to sue.

—— Liability incurred by fraud - - 358
See Liability incurred by Fraud.

—— Sale of debts - - - - 473
See Sale of Bankrupt's Debts.

—— Set-off - - - - - - 570
See Stranding.

BANKRUPTCY ACT, 1869 - - - 300
See Bankruptcy Jurisdiction.

—— - - - - - - - 519
See Composition.

—— - - - - - - - 358
See Liability incurred by Fraud.

—— - - - - - - - 473
See Sale of Bankrupt's Debts.

BANKRUPTCY JURISDICTION — *Bankruptcy — Jurisdiction of County Court — Adjudication — Copy of Gazette, of what conclusive—Execution against Goods of Bankrupt Trader—Bankruptcy Act*, 1869 (32 *&* 33 *Vict. c.* 71). *ss.* 10, 59, 71, 72, 80 *&* 87.] A petition for adjudication of bankruptcy was presented to a county court, describing the party against whom it was presented as a gentleman, and stating that he resided within the district of the county court, and did not reside or carry on business within the district of the London Bankruptcy Court, and that the act of bankruptcy was failure to pay, secure, or compound for a debt within three weeks of the service of a debtor's summons. The petition was accompanied by the usual affidavit verifying the statements therein required by the bankruptcy rules. Upon such petition the county court adjudicated the debtor a bankrupt in the usual form. The bankrupt did, in fact, carry on business as a wine merchant, under a name other than his own, in the city of London, but the fact of his so carrying on business was not brought to the attention of the county court judge at the time of the adjudication, nor was the fact of the bankrupt being a trader referred to either in the petition or the order of adjudication. The trustee appointed under the bankruptcy claimed the proceeds of an execution as against an execution creditor of the bankrupt, under the 87th section of the Bankruptcy Act, 1869, which applies only to the case of a bankrupt trader. At the trial of an interpleader issue to determine the right to the proceeds of the execution, at which the above facts were proved, and a copy of the *Gazette* containing the order of adjudication was put in, it was contended by the execution creditor that the adjudication of bankruptcy was a nullity, having been made by the county court without jurisdiction, inasmuch as the bankrupt in fact carried on business within the district of the London court; and, secondly, that if the order of adjudication was conclusive of the validity of the adjudication, it having been made against the bankrupt as a non-trader, the trustee was concluded by it from shewing that the bankrupt was in fact a trader:—*Held* (by Bovill, C.J., Byles and Grove, JJ.; dissentiente, Brett, J.), that the county court judge having decided as to the existence of the facts upon which his jurisdiction depended upon evidence before him of such facts, such decision was conclusive; and, consequently, by virtue of the 10th section of the Bankruptcy Act, 1869, a copy of the *Gazette* containing the order of adjudication was conclusive against the execution creditor, on the interpleader proceedings, of the validity of the adjudication. And, secondly, that the copy of the *Gazette* not being made conclusive by the 10th section except for the purposes of the adjudication, and there being nothing in the Act, at any rate where the act of bankruptcy was one common to traders and non-traders, as in the present case, requiring that the adjudication should be made against the bankrupt in the character of a trader or non-trader, the trustee was not concluded from shewing that the bankrupt was in fact a trader.—Per Brett, J., that, inasmuch as the validity of the adjudication, upon which the trustee's title depended, involved the assumption that the bankrupt did not carry on business in the district of the London Court of Bankruptcy, the trustee could not be allowed to allege that the bankrupt did so carry on business. Revell *v.* Blake - - - - 300

BANKRUPTCY JURISDICTION—*continued.*

—— - - - - - - - 519
See Composition.

BEERHOUSE—Time of closing - - 378
See "Parish or Place."

BESPEAKING JUDGES' NOTES - - 138
See Evidence to vary written Contract.

BOOK OF COMMON PRAYER—Offertory - 393
See Offertory.

BOROUGH VOTE - - **143, 150, 158, 227**
See Vote for Parliament. 1, 2, 3, 4.

BRECON MARKETS ACT, 1862 - - 555
See Toll Traverse.

BRIDGE—Shares—Title to vote - - 212
See Vote for Parliament. 7.

BROKER—Arbitration - **32, Ex. Ch. 525**
See Arbitrator.

BROKER—*continued.*

—— Custom of market - - Ex. Ch. 84
See Custom of Market.

BUILDING ACTS - - - - - 386
See Surveyor's Fee.

BUILDING LAND—Copyhold—Enfranchisement [535
See Enfranchisement of Copyhold. 1.

CAB-OWNER—*Master and Servant—Relation of Cab-Proprietor and Driver—Bailor and Bailee.*] The plaintiff, a cab-driver, obtained from the defendant, a cab-proprietor, a horse and cab on the usual terms, which are that the driver shall at the end of the day hand over to the proprietor 18*s.*, retaining for himself all the day's earnings over that sum—the day's food for the horse being supplied by the owner, and the latter having no control over the driver after leaving the yard. The horse with which the driver was furnished, which was fresh from the country and had never before been harnessed to a cab, bolted and overturned the cab and injured the driver. The jury found that the horse was not reasonably fit to be driven in a cab:—*Held*, by Byles and Grove, JJ., that the relation between the parties was that of bailor and bailee, and consequently that, upon this finding of the jury, the proprietor was responsible for the injury sustained by the driver:—*Held*, by Willes, J., that the relation was that of master and servant (or at most co-adventurers), and therefore that, in the absence of evidence of personal negligence or misconduct on his part, the owner was not responsible. *Powles* v. *Hider* (6 E. & B. 207; 25 L. J. (Q.B.) 331) observed upon. Fowler *v.* Lock. - - - 272

CALLS—Indemnity - - - - - 629
See Indemnity against Calls.

CARRIER—Animals - - - - - 655
See Carrier of Animals.

—— Contract—Damages - - - 583
See Damages for Breach of Contract.

—— Negligence—Evidence - - 78
See Evidence of Negligence. 1.

—— Passengers - - - Ex. Ch. 321
See Evidence of Negligence. 3.

CARRIER OF ANIMALS—*Railway Company—Common Carriers of Cattle, &c.—Vicious Animal—Negligence.*] The plaintiff delivered a bullock to the Great Western Railway Company at D., to be carried to N. In the course of the journey the animal escaped from the truck in which it was placed, and was killed. In a case stated by a county court judge, it was found that the escape of the bullock was wholly attributable to the efforts and exertions of the animal itself, and not to any negligence on the part of the company, and that the truck was in every respect proper and reasonably sufficient for the conveyance of cattle:—*Held*, that, upon this state of facts, the judge ought to have directed a verdict for the defendants,—the company (assuming them to be common carriers of cattle) not being responsible for the consequences of an inherent vice in the thing (or animal) to be carried, which results in its destruction without any negligence on their part. Blower *v.* The Great Western Railway Company - - - - - 655

CARRIER OF PASSENGERS—Negligence [Ex. Ch. 321
See Evidence of Negligence. 3.

CASE—*Abel* v. *Lee* (Law Rep. 6 C. P. 365) explained - - - - 227
See Vote for Parliament. 4.

—— *Beckett* v. *Midland Railway Co.* (Law Rep. 3 C. P. 82) sustained - - 508
See Compensation under Land Clauses Act.

—— *Bridges* v. *North London Railway Co.* (Law Rep. 6 Q. B. 377) distinguished - 321
See Evidence of Negligence. 3.

—— *Hellawell* v. *Eastwood* (6 Ex. 295) discussed
See Fixtures. [328

—— *Longbottom* v. *Berry* (Law Rep. 5 Q. B. 123) followed - - - - 328
See Fixtures.

—— *Mather* v. *Fraser* (2 K. & J. 536) followed
See Fixtures. [Ex. Ch. 328

—— *Mersey Docks* v. *Gibbs* (Law Rep. 1 H. L. 93) followed - - - - 458
See Corporation for public Purposes.

—— *Powles* v. *Hider* (6 E. & B. 207) observed upon - - - - 272
See Cab-owner.

—— *Praeger* v. *Bristol and Exeter Railway Co.* (24 L. T. (N. S.) 105) followed [Ex. Ch. 321
See Evidence of Negligence. 3.

—— *Reg.* v. *Hicklin* (Law Rep. 3 Q. B. 360) followed - - - - 261
See Obscene Libel.

—— *Rex* v. *Carlile* (3 B. & A. 167) followed 261
See Obscene Libel.

—— *Ricket* v. *Metropolitan Railway Co.* (Law Rep. 2 H. & L. 175) distinguished 508
See Compensation under Lands Clauses Act.

—— *Siner* v. *Great Western Railway Co.* (Law Rep. 4. Ex. 117) distinguished [Ex. Ch. 321
See Evidence of Negligence. 3.

—— *Stuart* v. *Crawley* (2 Stark. 323) distinguished
See Evidence of Negligence. 1. [78

—— *Tepper* v. *Nichols* (18 C. B. (N. S.) 121) affirmed - - - - 212
See Vote for Parliament. 7.

"CELEBRATING DIVINE SERVICE" - 393
See Offertory.

CHARTERPARTY—Notice of arrival - 651
See Notice of Ship's Arrival.

—— Seaworthiness - - - - 421
See Warranty of Seaworthiness.

COMMON CARRIER—Animals - - 655
See Carrier of Animals.

COMMON—Severance - - - 592
See Common in Gross.

COMMON IN GROSS—*Severance—Measure of Levancy and Couchancy—Immemorial Exercise of a Right.*] If evidence be given, after long

COMMON IN GROSS—*continued.*

enjoyment of property to the exclusion of others, of such a character as to establish that it was dealt with as of right as a distinct and separate property, in a manner referable to a possible legal origin, it is presumed that the enjoyment in the manner long used was in pursuance of such an origin, which, in the absence of proof that it was modern, is deemed to have taken place beyond legal memory.—The corporation of Colchester claimed and had from time immemorial exercised, either by actual enjoyment (by the free burgesses) or by receipt of rent or acknowledgment, an *exclusive* right of common of pasture in certain lands round the walls of the town (including a farm called Drury Farm), and containing about 1023 acres in scattered portions, for all cattle, sheep, and other commonable animals levant and couchant within the borough, from Lammas to Candlemas, save as to any part of the land sown at or before the commencement of such period with corn or other grain, and in that case only after such crops should be harvested or otherwise removed in a due course of husbandry. The corporation had also from time to time, commencing in the reign of Henry VIII., exercised the right of releasing for valuable consideration,—sometimes a gross sum, and sometimes a quit-rent,—their rights of common over certain of the lands subject thereto, still continuing to exercise them over the rest, as before, without any resistance thereto on the ground that the release of part of the land extinguished the whole right of common. In some instances also the common rights of the corporation had been conveyed to strangers, who had exercised such rights. Down to 1834, the right of common over about 831 acres had been so sold or released. The plaintiff was lessee of Drury Farm under one Steele, who became possessed of the property in 1838.—In the previous title-deeds, which went back to 1583, there was no mention of the right of common; and the conveyance of 1838 was made "subject to any rights or privileges which the corporation, or any person claiming under them, might possess over the same."—The defendant (who was a free burgess of Colchester), claiming the right of common over 110 acres, part of Drury Farm, under a conveyance of January 10, 1870, from a grantee of the corporation, turned his cattle upon the plaintiff's land.—Upon a case stated for the opinion of the Court, with power to the Court to draw inferences of fact:—*Held*, that the proved exercise of the right was reconcilable with, and only to be accounted for by, the assumption that the right of corporation was originally granted to the corporation in gross out of the land and each atom thereof, with power to grant or release any part, as in the case of a several pasture; and consequently that the right of common was not defeated by the grant or release of part,—upon the principle that "antiquity of time justifies all titles, and supposes the best beginning the law can give them.—Levancy and couchancy is a mere measure of the number of cattle or other animals that may be put upon the common, and does not necessarily indicate appurtenancy. JOHNSON *v.* BARNES - - - - 592

COMMON LAW PROCEDURE ACT, 1854 [127, 352
See PRODUCTION OF DOCUMENTS. 1, 2.

COMMON LAW PROCEDURE ACT, 1860 - 409
See ADDING PLAINTIFF.

COMPANY—Calls—Indemnity - - 629
See INDEMNITY AGAINST CALLS.

—— Directors—Authority - - - 43
See DIRECTORS' AUTHORITY.

COMPENSATION—Copyhold—Enfranchisement [535, 639
See ENFRANCHISEMENT OF COPYHOLD. 1, 2.

—— Lands Clauses Act - - 18, 508
See COMPENSATION UNDER LANDS CLAUSES ACT. 1, 2.

COMPENSATION UNDER LANDS CLAUSES ACT (8 *Vict. c.* 18), *s.* 121—*London Improvement Act,* 1847 (10 *&* 11 *Vict. c. cclxxx.*), *s.* 34—*Six Months' Notice of intention to take Lands—Tribunal by which Compensation to be assessed—Interest of Tenant, whether to be regarded at Commencement or Expiration of the Six Months' Notice.*] By the Holborn Valley Improvement Additional Works Act, 1867 (30 & 31 Vict. c. lv.) s. 14, the provisions of the London City Improvement Act, 1847 (10 & 11 Vict. c. cclxxx.), and the Lands Clauses Consolidation Act, 1845, except the part of the latter Act with respect to the purchase and taking of lands otherwise than by agreement, are incorporated, except so far as the said provisions are repealed, altered, or varied by, or are inconsistent with the provisions of the Act. The London City Improvement Act gives certain special powers to the corporation, enabling them to take and use lands required for the purposes of the Act upon giving six months' notice of their intention to do so, and provides for the assessment, by a jury, of compensation to the persons whose lands have been taken.—Sect. 34 of the London City Improvement Act provides that all persons in the actual possession of any lands to be taken, as owners, leaseholders, tenants at will or lessees for a year or for any shorter time, or otherwise, shall, at the expiration of six months from and after notice in writing from the corporation, peaceably and quietly deliver up possession of such lands, but no such possession shall be delivered up until such payment or deposit of purchase or compensation money shall have been made, as is directed by the Lands Clauses Consolidation Act, 1845. The 121st section of the Lands Clauses Consolidation Act, 1845, provides that compensation to any person in possession of lands to be taken, and having no greater interest therein than as tenant for a year or from year to year, for the value of his interest, and for any loss or injury he may sustain, shall be determined by two justices.—Under the provisions of the special Acts the corporation gave six months' notice to the tenant of certain lands of their intention to take the same.—At the time of such notice being given, more than a year, but, at the expiration of such notice, less than a year, of the tenancy remained:—*Held*, that for the purpose of determining whether the compensation to the tenant was to be assessed by a jury or by justices under the 121st section of the

COMPENSATION UNDER LANDS CLAUSES ACT—*continued.*

Lands Clauses Consolidation Act, the tenant's interest at the time of giving the notice, and not at its expiration, was to be considered, and that, therefore, he was entitled to have his compensation assessed by a jury. Tyson *v.* The Mayor of London - - - - - - 18

2. —— (8 *Vict. c.* 18), *s.* 68—*Compensation for Lands injuriously affected — Thames Embankment Act*, 1862 (25 *& 26 Vict.*) *c. xciii.*] The plaintiff was the occupier, under a lease for a long term, of a house and premises in the city of London, where he carried on the business of a carman and contractor, and which premises were adjacent to a public draw-dock leading to the river Thames. The plaintiff had no right or easement to or in the dock other than his right as one of the public; but, by reason of their proximity to the dock, and the access given thereby to and from the river, his premises were rendered more valuable either to sell or to occupy, with reference to the uses to which any owner might put them.—The Metropolitan Board of Works, in constructing the Thames (northern) Embankment under the powers conferred upon them by the 25 & 26 Vict. c. xciii, filled up the dock, and so cut off the access from the river to the public street adjoining the plaintiff's premises, which thereby became, as premises either to sell or occupy in their then state, and with reference to the uses to which any owner or occupier might put them, permanently damaged and diminished in value :—*Held*, that the plaintiff's interest in his premises was injuriously affected within the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, s. 68, so as to entitle him to compensation.—*Ricket* v. *Metropolitan Ry. Co.* (Law Rep. 2 H. L. 175), distinguished.—*Beckett* v. *Midland Ry. Co.* (Law Rep. 3 C. P. 82), sustained. M'Carthy *v.* Metropolitan Board of Works - - - - - - 508

COMPOSITION—*Bankrupt—s.* 126 *of the Bankruptcy Act*, 1869 (32 *& 33 Vict. c.* 71)—*Effect of Non-payment of the Composition—Tender—Jurisdiction of the Court.*] It is competent to a non-assenting creditor, notwithstanding a resolution for a composition under s. 126 of the Bankruptcy Act, 1869 (duly registered under s. 127), to sue for his original debt, where the debtor has failed to pay or tender the composition within the time agreed on, or within a reasonable time. The creditor is not restricted to the summary remedy, by application to the Court of Bankruptcy, provided by that section.—*Quære*, as to the power of the Court of Bankruptcy, under s. 13, or under rule 260, to restrain such an action. Edwards *v.* Coombe - - - - - - 519

CONDITION PRECEDENT — Charterparty — Seaworthiness - - - 421
See Warranty of Seaworthiness.

CONTRACT—Agent—Custom of market **Ex. Ch. 84**
See Custom of Market.

—— Carrier—Damages - - - 583
See Damages for Breach of Contract.

—— Construction — Duty of judge and jury [**Ex. Ch. 530**
See Shipment in June and [or] July.

CONTRACT—*continued.*

—— Guardians—Lunatic - - 366
See Lunatic.

—— Quality of goods sold **32, Ex. Ch. 525**
See Arbitrator.

—— Written—Parol evidence - - 138
See Evidence to vary written Contract.

COOLIE PASSAGE MONEY —— Freight—Insurance - - - - [341
See Freight.

COPYHOLD—Enfranchisement—Compensation [535, 639
See Enfranchisement of Copyhold, 1, 2.

CORPORATION—Negligence—Liability 458
See Corporation for public Purposes.

CORPORATION FOR PUBLIC PURPOSES—*Negligence—Liability to repair Towing-path.*] The defendants were a corporate body in whom were vested, by the Thames Navigation Act, 1866 (29 & 30 Vict. c. 89), certain powers and authorities for the preservation and improvement of the stream, bed and banks of the upper part of the Thames, including all powers and authorities before that Act vested in the commissioners appointed for the purposes of the upper navigation of the Thames under earlier statutes. From these statutes it appeared that there were originally owners and occupiers of towing-paths on the river banks who took toll for horses passing along them, and that such persons were bound to keep the towing-path in repair; and that by the statutes the commissioners had extensive powers of supervision and control over the towing-paths, and power to make orders respecting them and to regulate the toll to be taken by persons entitled to take it. They subsequently acquired by the statutes power to purchase and take lands compulsorily, and to execute works for the purposes of the navigation; and by the Act of 28 Geo. 3, c. 51, s. 6, were authorized themselves to take toll, for, amongst other things, the towing-paths purchased or hired by them. By the 35th Geo. 3, c. 106, ss. 18, 23, they obtained power to execute any works or repairs that they thought needful or proper, and to pay for them out of the rates and tolls, and also to make and establish a continued horse towing-path throughout the navigation, and to purchase land for that purpose. By the Thames Navigation Act, 1866, the defendants were authorized to take tolls and apply their funds to the expenses of the repair, &c., of the works vested in, acquired by, or constructed by them under the Act, and to carry into execution the purposes of that Act and of the former Acts.—In consequence of a part of the bank on the upper navigation of the Thames being out of repair and giving way, some horses of the plaintiff, which were engaged in towing a barge, fell into the river and were drowned. The defendants had, in pursuance of the powers vested in them in 1866, made a parol arrangement with the owner of the soil of the towing-path, at the place in question, for the use of such towing-path at an annual rent, and having likewise acquired the use of the whole of the rest of the towing-paths along the river, they were in the habit of taking an aggregate toll for the use of the whole of the navigation

CORPORATION FOR PUBLIC PURPOSES—*cont.* and towing-path at Teddington Lock, which they had done in the present instance. The plaintiff having brought an action against the defendants for negligence in not keeping the towing-path in repair:—*Held*, that the defendants had power under their statutes to maintain and repair the towing-path, for the use of which they were entitled to take a toll; that according to the decision in *Mersey Docks* v. *Gibbs* (Law Rep. 1 H. L. 93), the intention of the legislature in such cases is that the corporation shall have the same duties, and its funds shall be subject to the same liabilities, as the general law would impose upon a private person having and exercising the same rights; and consequently that, the defendants having provided the towing-path under their Acts, having power under such Acts to maintain and repair it, and having invited the public to use it and taken toll for the use of it, were bound to take reasonable care that it was in a fit condition to be used as a towing-path; and that the action was maintainable.—The towing-path includes so much of the bank as is necessary and proper for the purpose of towing barges, and is reasonably and properly used as such. Winch *v.* The Conservators of the Thames - 458

COSTS—Attorney—Action without authority 358
See Liability incurred by Fraud.

—— Inspection of documents - - 362
See Production of Documents. 2.

COUNTY COURT JURISDICTION—*Admiralty Jurisdiction—Claim for Breach of Charterparty—31 & 32 Vict. c. 71—32 & 33 Vict. c. 51, s. 2—Prohibition.*] By 32 & 33 Vict. c. 51, s. 2, it is enacted that "Any county court appointed, or to be appointed, to have Admiralty jurisdiction, shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes: 1. As to any claim arising out of any agreement made in relation to the use or hire of any ship, &c., provided the amount claimed does not exceed 300*l.*":—*Held*, that this section does not give the county court Admiralty jurisdiction in respect of a claim for breach of a charterparty, such claim being one over which the High Court of Admiralty would have no jurisdiction, on the ground that the intention of the Act is not to give the county court Admiralty jurisdiction in cases where the High Court of Admiralty would not have had jurisdiction, but only to give to the county court a portion of the jurisdiction of the High Court of Admiralty. Simpson *v.* Blues 290

—— Bankruptcy - - - - 300
See Bankruptcy Jurisdiction.

COUNTY VOTE 163, 172, 178, 185, 190, 193, 198 [202, 212
See Vote for Parliament. 5—13.

COVENANT NOT TO ASSIGN—*Lease—Partners.* A. and B., partners in trade, were assignees of a lease which contained a covenant by the lessee, for himself and his assigns, that he would not, neither should his executors, administrators, or assigns, assign the demised premises without the consent in writing of the lessor. On the dissolution of the partnership, A. assigned all his interest in the premises to B.:—*Held*, a breach of the covenant. Varley *v.* Coppard - - 505

COVENANT NOT TO SUE—*Bankrupt Acts, 1861 and 1869 (24 & 25 Vict. c. 134, and 32 & 33 Vict. c. 71)—Release of Debtor, subject to Reservation of Rights against Sureties—Provisions for carrying on Business by Trustees.*] A deed of arrangement under the Bankruptcy Acts, 1861 and 1869 (24 & 25 Vict. c. 134, and 32 & 33 Vict. c. 71), contained a release of the debtor, subject to a proviso reserving the rights of creditors holding securities:—*Held*, that this operated as a covenant not to sue, and not as an extinguishment of the debt so as to bar the remedy against the surety, notwithstanding the deed contained an absolute assignment of all the debtor's property and effects to the trustees, and also provisions for enabling them to carry on the trade for the benefit of the estate. Bateson *v.* Gosling - - - - - 9

CREDITOR'S DEED—Covenant not to sue 9
See Covenant not to sue.

CRIMINAL LUNATIC—Maintenance - 366
See Lunatic.

CUSTOM—Agent - - - Ex. Ch. 84
See Custom of Market.

CUSTOM OF COUNTRY—*Landlord and Tenant—Implied Contract—Valuation between Incoming and Outgoing Tenant—Browse of Straw.*] The plaintiff was tenant of a farm, with a right to the use of a certain part of the premises without payment until the 25th of March next after the expiration of the term, "for threshing and spending the last year's crop;" and by the custom of the country he was entitled, at the expiration of the term, to be paid by the landlord or the incoming tenant for certain tillages. He gave up the farm to the defendant, as incoming tenant, at Michaelmas, 1870, and before so doing valuers were mutually appointed to value the tillages as between them, with the consent of the landlord, and the valuers duly made and signed their valuation. After the defendant had entered into possession, but before the 25th of March, 1871, the landlord gave him notice that rent was due from the plaintiff, and required him to pay the amount of the valuation, which was less than the rent due, to him the landlord, and not to the plaintiff; and this the defendant did on receiving an indemnity from the landlord, but without the plaintiff's consent. The plaintiff having sued the defendant for the value of the tillages, was nonsuited:—*Held* (the Court having power to draw inferences of fact), that the nonsuit was right, for that the contract to be implied between the incoming and outgoing tenant was subject to the right of the landlord to be paid the arrears of rent out of the valuation.—The plaintiff, on quitting the farm at Michaelmas, 1870, gave up to the defendant, and the defendant exercised it, the right which the plaintiff had under the lease of converting the straw on the farm (between Michaelmas, 1870, and the 25th of March, 1871) into manure with his cattle. In so converting it the cattle ate a certain portion of the straw, calculated to be one-third of the bulk, and which the valuers in this case valued as browse at 33*l.*:—*Held*, that the plaintiff was entitled to recover this sum from the defendant. Stafford *v.* Gardner - 242

CUSTOM OF MARKET—*Principal and Agent—Contract by Brokers.*] The defendant, a merchant

CUSTOM OF MARKET—*continued.*
in Liverpool, employed the plaintiffs, tallow-brokers in London, to buy tallow for him in the London market.—In an action brought by the plaintiffs against the defendant to recover the loss upon the re-sale of the tallow, which the defendant had refused to accept, it was proved "that there exists an established custom in the London tallow-trade, for brokers, when they receive an order from a principal for the purchase of tallow to make a contract or contracts in their own names without disclosing their principals, and also to make such contracts either for the specific quantity of tallow so ordered, or to include such order with others they may have received in a contract for the entire quantity, or in any quantities, at their convenience, at the same time exchanging bought and sold notes with the selling brokers, and passing to their principals a bought-note for the specific quantity ordered by them; and that, when a broker so purchases in his own name, he is personally bound by the contract; and that, on the usual settling days, the brokers balance between themselves the purchases and sales so made, and make or receive deliveries to or from their principals, as the case may be, or, if their principals refuse to accept or deliver, then to sell or buy against them, as the case may be, and charge them with the loss, if any, or, if delivery is not required on either side, then any difference which may arise from a rise or fall in the market is paid by the one to the other."—All the dealings between the plaintiffs and the defendant were carried out in accordance with the above custom, which, however, does not exist in Liverpool, and was unknown to the defendant:—*Held*, by Kelly, C.B., Channell, B., and Blackburn, J., that the employment of the plaintiffs by the defendant was an employment to buy according to the usages of the London tallow-market, and that the defendant was bound by those usages, notwithstanding he was ignorant of their existence.—*Held*, by Mellor and Hannen, JJ., and Cleasby, B., that the plaintiffs, having been employed as brokers to make the contract for the defendant, and having professed to act as brokers, and charged brokerage for their services as such, were not entitled, as against a person unconnected with the London tallow-market and ignorant of its usages, to set up a custom or usage that they should fill a different character, and become themselves principals in the transaction instead of brokers. Mollett *v.* Robinson **Ex. Ch. 84**

DAMAGE—Remoteness - - - 253
See Proximate Cause of Injury.

DAMAGES FOR BREACH OF CONTRACT—*Common Carrier—Notice of special Circumstances.*] The plaintiffs, who were under a contract to supply a quantity of military shoes to H. in London (for the use of the French army), at 4*s.* per pair, an unusually high price, to be delivered there by the 3rd of February, 1871, sent the shoes to the defendants' station at K. in time to be delivered in the usual course in the evening of that day, when they would have been accepted and paid for by the consignee; and the station-master had notice (which for the purpose of the case was assumed to be notice to the company) at the time that the plaintiffs were under a contract to deliver the shoes by the 3rd, and that unless they were so delivered they would be thrown on their hands, but no notice was given to the defendants that the contract with H. was, owing to very exceptional circumstances, not an ordinary contract.—The shoes not arriving in London until the 4th, H. rejected them, and the plaintiffs were ultimately obliged to sell them at a loss of 1*s.* 3*d.* per pair,—2*s.* 9*d.* per pair being the ordinary market value.—In an action against the defendants for their breach of contract, they paid into Court a sum sufficient to cover any ordinary loss occasioned by the delayed delivery; but the plaintiffs further claimed 267*l.* 3*s.* 9*d.*, the difference between the price at which they had contracted to sell the shoes to H. and the price which they ultimately fetched;—*Held*, that they were not entitled to recover the latter sum, the damage not being the natural consequence of the defendants' failure to perform their contract, and the defendants not having had notice that the sale to H. was at an exceptional price. Horne *v.* The Midland Railway Company 583

DEBTS, SALE OF—Bankrupt - - 473
See Sale of Bankrupt's Debts.

DEDUCTIONS—Net yearly value - - 185
See Vote for Parliament. 5.

DEPARTURE IN PLEADING—Sale of debts 473
See Sale of Bankrupt's Debts.

DESCRIPTION OF QUALIFICATION 143, 150, 163
See Vote for Parliament. 1, 2, 10.

DIRECTION—Company—Authority - 43
See Directors' Authority.

DIRECTORS' AUTHORITY — *Public Company — Ratification by Shareholders of an Act ultrà Vires of the Directors.*] A company was established for the working of two mines, with a nominal capital of 300,000*l.*, divided into 12,000 shares of 25*l.* each. Difficulties arising as to the title to one of the mines, and the defendants, who had negotiated the purchases for the company, and were to receive 10,000*l* from the vendor of each mine, and had received the 10,000*l.* upon the completion of the purchase of the other mine, having bought 400 shares in the market and not being prepared to take them up, applied to the company for assistance, and the latter advanced them 6500*l.* upon the defendants undertaking to return it in the event of the purchase of the second mine not being completed within three months. The shares were taken up, but the contract for the purchase of the mine ultimately went off. The directors then called upon the defendants to return the 6500*l.*, and, after much negotiation, it was arranged that the defendants should transfer to the company the 400 shares (10*l.* paid up), in satisfaction and discharge of the claim of the company against them. This transaction took place in August, 1866; and in March, 1867, at a meeting of the shareholders it was agreed that the company should go into liquidation and its business be transferred to a new company with a diminished capital and 10*l.* shares, the directors of the new company being the directors of the old one, and the shareholders in the old company being holders of share for share in the new one. A report of the directors was read, shewing the reasons for the liquidation and transfer, and that the diminution of the capital was owing partly to the abandonment of the pur-

DIRECTORS' AUTHORITY—*continued.* chase of the second mine and partly to "shares forfeited for non-payment of calls." At this meeting an account was handed to each shareholder present, in which the sum of 4000*l.* was set down as the price of "shares cancelled;" and the account of the defendants in the company's ledger was credited with 4000*l.*, "as per shares forfeited account."—By the articles of association of the company the directors were prohibited from purchasing their own shares; but they had power to compromise debts due to them, and to forfeit shares for non-payment of calls:—*Held,* that, assuming that the compromise with the defendants by the acceptance and cancellation of the 400 shares was ultrà vires of the directors, the subsequent conduct of the shareholders in assenting to the transfer of the old to the new company, with knowledge or the opportunity and means of knowing, if they thought proper to inquire, that such transfer was in part founded upon such cancellation, was a ratification and acquiescence in what the directors had done, and sustained a plea of accord and satisfaction to an action brought in 1870 against the defendants in the name of the old company for the recovery of the 6500*l.* advance.—To shew assent and acquiescence in such a case, it is not necessary (or possible) to prove the acquiescence of each individual shareholder. It is enough to shew circumstances which are reasonably calculated to satisfy the Court or a jury that the thing to be ratified came to the knowledge of all who chose to inquire, all having full opportunity and means of inquiry. By one of the articles of association of a joint-stock company, it was provided that "the company shall not, under any circumstances, purchase its own shares." The directors, having advanced money to the promoters of the company, to enable them to take up shares which they (the promoters) had bought, but for which they were unable to pay, agreed, by resolution, to abandon their claim to have the money returned, in consideration of 400 shares (upon which 10*l.* per share had been paid up) being given up to them to be cancelled:—*Semble,* that this was a "purchase of shares" within the prohibition above mentioned. The Phosphate of Lime Company, Limited *v.* Green - 43

DISCOVERY—Interrogatories - - 287
See Interrogatories.

DISTRESS—Waiver of forfeiture - - 360
See Waiver of Forfeiture.

"DIVINE SERVICE, RITE, OR OFFICE" - 393
See Offertory.

DOCUMENTS, INSPECTION OF - 127, 352
See Production of Documents. 2.

DOG—Carrier—Negligence - - 78
See Evidence of Negligence.

DUTY OF JUDGE AND JURY—Written contract [**Ex. Ch.** 530
See Shipment in June and [or] July.

"DWELLING-HOUSE" - - - 143
See Vote for Parliament. 1.

ECCLESIASTICAL LAW—Offertory - 393
See Offertory.

ELECTION—Parliamentary.
See Vote for Parliament.

ENCROACHMENT—*Landlord and Tenant—Assent of Landlord—Statute of Limitations* (3 *&* 4 *Wm.* 4, *c.* 27), *s.* 7.] The lessee of certain premises for a term of ninety-nine years, dependent on four lives, enclosed, with the assent of the lessor given by word of mouth, a piece of adjoining waste which belonged to the lessor, as lord of the manor, on the understanding that the piece so enclosed should be treated as if comprised in the lease. Upon the determination of the lease, which was more than twenty-one years from the date of the enclosure, the reversioners brought ejectment to recover the land so enclosed from the tenant:—*Held,* that the assent of the landlord to the enclosure of the additional piece of land did not create such a tenancy of the land as to bring the case within the 7th section of 3 & 4 Wm. 4, c. 27, or prevent such enclosure from being an encroachment within the ordinary rule of law that an encroachment made by a tenant must be taken to be made for the benefit of the landlord, and treated as part of the demised premises; and that consequently the Statute of Limitations did not begin to run till the determination of the lease, and the plaintiffs were entitled to recover the land. Whitmore *v.* Humphries - - - - - 1

ENFRANCHISEMENT OF COPYHOLD — *Assessment of Compensation to the Lord—Facility for Building Purposes*—15 *&* 16 *Vict. c* 51, *s.* 16—*Settled Estates Act,* 19 *&* 20 *Vict. c.* 120.] In assessing the amount of compensation payable to the lord on a compulsory enfranchisement of a copyhold tenement under 15 & 16 Vict. c. 51, regard is to be had, not only to the capability of the land for future improvements, but also to any present obstacles which may stand in the way of improvements.—Where, therefore, copyhold lands were the subject of a settlement (by will) which precluded the granting of leases for more than twenty-one years, and a portion of them was at the time of the enfranchisement held by a third person under a lease granted with the licence of the lord, and the other portion could have no frontage to a public road pending such lease:—*Held,* that in assessing the compensation payable to the lord, the valuers were not bound by the mode in which the property was then enjoyed, viz. as a private residence, but might take into consideration the capacity of the land for improvement by applying it to building purposes.—But, *held,* that they were also bound to take into their consideration the impediments standing in the way of its being presently used as building land. Arden *v.* Sir John Maryon Wilson, Bart. - - 535

2. —— *Valuation of Lord's Right in respect of Timber—Basis of Computation of Rent-charge in the Case of a Tenant for Life—In what Cases an Appeal lies.*] The lord of a manor has rights in respect of the timber on the copyhold properties, for which rights he was upon a commutation under 4 & 5 Vict. c. 35, and is upon an enfranchisement under 15 & 16 Vict. c. 51, and 21 & 22 Vict. c. 94, entitled to compensation.—Upon an appeal against a decision of the Copyhold Commissioners awarding compensation to the lord, upon a compulsory enfranchisement, in respect of timber growing on the land, if there be any evidence of a special custom entitling the lord to a fine upon the grant of a licence to fell timber, it is the exclusive

ENFRANCHISEMENT OF COPYHOLD—*cont.* province of the commissioners to determine, as a question of fact, whether such evidence proved the existence of the custom; s. 8 of 15 & 16 Vict. c. 51, giving an appeal only upon a question of law.—The tenant having upon her admission paid a full fine assessed at two years' improved value of the land,—which admission, according to the custom of the manor, enured as an admission of the tenant in remainder,—no other fine (except on alienation) would become payable to the lord until after the deaths of both tenant for life and tenant in remainder:—*Held*, that the valuers, upon a compulsory enfranchisement at the instance of the lord, were not bound to take the fine so paid as the basis of the computation of the rent-charge; nor to state in their award what proportion of the rent-charge should, under s. 28 of 4 & 5 Vict. c. 35, or s. 35 of 15 & 16 Vict. c. 51, be deferred until the next act or event on which a fine would become payable to the lord, or to state such particulars as might enable the commissioners to defer payment of the whole or any part of the rent-charge, so as to "prevent the hardship or injustice which the tenant would otherwise suffer by the compulsory enfranchisement."—But the Court intimated a strong opinion, in point of fact, that it was a case of hardship which the commissioners might and ought by some means to mitigate. Reynolds *v.* The Lord of the Manor of Woodham Walter [639

EQUITABLE SET-OFF—*Joint and Several Promissory Note—Liability of Surety—Equitable Set-off of Debt due to Principal.*] In an action by the payee of a joint and several promissory note against one who, to the knowledge of the payee, joined in it as a surety only, it is competent to the surety, by way of equitable defence, to plead a special plea of a set-off due from the principal, arising out of the same transaction out of which the liability of the surety rose. Bechervaise *v.* Lewis - - 372

EVIDENCE—Bankruptcy—Gazette - 300
See Bankruptcy Jurisdiction.

—— Interrogatories - - - 287
See Interrogatories.

—— Negligence - - - 78, 121
See Evidence of Negligence.

—— Parol—Written contract - - 138
See Evidence to vary written Contract.

EVIDENCE OF NEGLIGENCE—*Railway Company—Carriers—Bailee.*] A valuable greyhound was delivered by its owner to the servants of a railway company, who were not common carriers of dogs, to be carried, and the fare demanded was paid. At the time of delivery the greyhound had on a leathern collar with a strap attached to it. In the course of the journey, it being necessary to remove the greyhound from one train to another which had not then come up, it was fastened by means of the strap and collar to an iron spout on the open platform of one of the company's stations, and, while so fastened, it slipped its head from the collar and ran upon the line and was killed:—*Held*, that the fastening the greyhound by the means furnished by the owner himself, which at the time appeared to be sufficient, was no evidence of negligence on the part of the company.—*Stuart* v. *Crawley* (2 Stark. 323) distinguished. Richardson *v.* North Eastern Railway Co. - 78

2. —— *Practice as to obtaining Letters Patent.*] On the 28th of April, 1870, the plaintiffs retained the defendant, a patent-agent, to obtain for them letters-patent for "A new automaton vase or depôt for holding coals," and on the 30th a provisional specification was filed. Nothing more was done by the defendant until the end of August, when he gave notice of his intention to proceed with the patent, pursuant to s. 12 of 15 & 16 Vict. c. 83; and in October he applied for the fiat of the Attorney-General for sealing the patent.—In the meantime, viz on the 15th of June, 1870, one P. had, as the defendant was aware, filed a provisional specification for "Improvements in coal vases," which turned out to be substantially the same as the plaintiffs' invention, and had on the 10th of September obtained a grant of letters-patent for the same.—The Attorney-General rejected the plaintiffs' application, upon the authority of *Ex parte Bates* (Law Rep. 4 Ch. 577), where under similar circumstances the second applicant for provisional protection, in the absence of fraud, was held entitled to have his letters-patent sealed, of which decision, though pronounced in May, 1869, the defendant was ignorant:—*Held*, that there was evidence of negligence on the part of the defendant. Lee *v.* Walker - - - - 121

3. —— *Railway Company—Invitation to Passenger to alight.*] The plaintiff was a traveller on the defendants' line of railway by a train which arrived at the station for which the plaintiff was bound at night. The part of the platform at that station at which passengers could alight was of sufficient length for the whole train to have been drawn up alongside of it, but in addition to that part the platform extended some distance gradually receding from the rails. When the train drew up the body of it was alongside the platform, but the last carriage, in which plaintiff rode, was opposite the receding part of the platform and about four feet from it. The night was very dark, and the place where the last carriage stopped was not lighted, though the rest of the station was well lighted with gas. There was no express invitation given to the plaintiff by the company's servants to alight, but the train had been brought to a final standstill, and did not move on again until it started on its onward journey. No warning was given to the plaintiff that the carriage was not close to the platform or that care would be necessary in alighting. The plaintiff opened the carriage door and, stepping out, fell into the space between the carriage and the platform, and sustained injuries, for which she brought an action against the company:—*Held*, that there was evidence of negligence on the part of the defendants' servants to go to the jury.—Bringing a railway carriage to a standstill at a place at which it is unsafe for a passenger to alight, under circumstances which warrant the passenger in believing that it is intended he shall get out, and that he may do so with safety, without any warning of his danger, amounts to negligence on the part of the company, for which, in the absence of contributory negligence on the part of the passenger, an action

EVIDENCE OF NEGLIGENCE—*continued.*

may be maintained.—*Praeger* v. *Bristol and Exeter Ry. Co.* (24 L. T. (N.S.), 105), followed; *Siner* v. *Great Western Ry. Co.* (Law Rep. 4 Ex. 117); and *Bridges* v. *North London Ry. Co.* (Law Rep. 6 Q. B. 377), distinguished. Cockle *v.* London and South Eastern Railway Co. - **Ex. Ch. 321**

EVIDENCE TO VARY WRITTEN CONTRACT—*Contract for Service—Weekly Hiring—Statute of Frauds—Bespeaking Judge's Notes.*] The plaintiff entered the service of the defendants under a memorandum in writing, as follows:—"April 13th, 1871. I hereby agree to accept the situation as foreman of the works of Messrs. Roe & Co., flock and shoddy manufacturers, &c., and to do all that lays in my power to serve them faithfully, and promote the welfare of the said firm, on my receiving a salary of 2*l.* per week and house to live in from the 19th of April, 1871:"—*Held*, a weekly hiring from the 19th of April, 1871; and that evidence of a conversation at the time of signing the contract, tending to shew that a hiring for a year was intended, was not admissible.—The stamp of 5*s.* on bespeaking judges' notes is sufficient only where the cause is tried before a judge of the court in which the rule nisi is granted. Where the trial is had before a judge of another court, a further fee of 6*d.* per folio is payable Evans *v.* Roe - - - - - **138**

EXCUSE FROM PAYMENT OF RATES - **227**
See Vote for Parliament. 4.

EXECUTION—Trader—Court of Bankruptcy **300**
See Bankruptcy Jurisdiction.

FAIR CRITICISM—Libel—Privilege - **606**
See Privileged Communication.

FEE—Surveyor—Building Acts - - **386**
See Surveyor's Fee.

FIRE INSURANCE—Bailee - - - **25**
See Bailment in Trust.

FIXTURES — *Mortgagor and Mortgagee.*] The owner in fee of a worsted mill, at which he carried on the business of a worsted spinner and stuff manufacturer, mortgaged it to the plaintiffs. By a deed of arrangement under the Bankruptcy Act, 1861, subsequently executed, the mortgagor assigned all his property to the defendants as trustees for the benefit of his creditors. Under this latter deed the defendants seized certain looms which were in the mill that was mortgaged. These looms were attached to the stone floors of the rooms of the mill by means of nails driven through holes in the feet of the looms, in some cases into beams which had been built into the stone, and in other cases into plugs of wood driven into holes drilled in the stone for the purpose. It was necessary that the looms should be so attached for the purpose of steadying them and keeping them in a true direction, perpendicular to the line of the shafting, by means of which the steam power was applied to them. It was impossible to remove the looms without drawing the nails; but this could be done easily and without any serious damage to the flooring. The plaintiffs brought trover for the looms:—*Held*, (affirming the decision of the Court below), that the looms passed by the mortgage of the mill as part of the realty, and the action was therefore maintainable.—*Mather* v. *Fraser* (2 K. & J. 536), and *Longbottom* v. *Berry* (Law Rep. 5 Q. B. 123), followed; *Hellawell* v. *Eastwood* (6 Ex. 295) discussed. Holland *v.* Hodgson - **Ex. Ch. 328**

FOREIGN AVERAGE STATEMENT — *Marine Insurance.*] A cargo of rye was insured for 4160*l.* from Taganrog to Bremen. The policy contained the usual memorandum, "Corn, &c., are warranted free from average unless general or the ship be stranded," &c., and in the margin were the following conditions: "*To pay general average as per foreign statement, if so made up.* Warranted free from particular average unless the ship or craft be stranded, sunk, or burnt; but this warranty not to exonerate the underwriters from the liability to pay any special charges for mats, warehousing, forwarding, or otherwise, if incurred, as well as partial loss arising from transhipment. Warranted free from capture and seizure and the consequences of any attempt thereat."—After leaving Taganrog, the vessel encountered severe weather, and was compelled to put into several ports for repair, at each of which the captain, in order to enable him to obtain funds to put her in a condition to continue her voyage, gave a bottomry-bond on ship, freight and cargo, the aggregate of which, with interest, on the arrival of the ship at Bremen, amounted to 2818*l.* 10*s.* 5*d.* The captain being unable to discharge this obligation, the consignees of the cargo, in order to obtain delivery thereof, paid the amount.—On the 3rd of August 1868, a statement was prepared by an average-stater in Bremen, in which the loss arising upon the bottomry-bonds was apportioned between the ship and freight and the cargo, as follows:—1088*l.* 14*s.* 11*d.* as falling upon the cargo, and 1185*l.* 11*s.* upon the ship and freight. The captain being unable to pay or give security for the 1185*l.* 11*s.* so charged upon ship and freight, the vessel was sold under an order of the Tribunal of Commerce at Bremen, and produced 729*l.* 10*s* 2*d.*, leaving a balance due to the holders of the bonds (the 1088*l.* 14*s.* 11*d.* having been paid) of 663*l.* 2*s.* 10*d.* On the 3rd of October a "further or supplemental average-statement" was made by the average-stater, in which the last-mentioned sum was stated as "the amount which the cargo had to pay as additional bottomry debt" to the holders of the bonds. These "average-statements" were (upon a special case) admitted to be accurate, and "correctly made up in accordance with the law in force in Bremen;" and it was further admitted that "such a loss as that which occurred in this case is treated at Bremen as a general average loss, and not as a particular average loss:"—*Held*, that the underwriters were bound by the average-statements so made and consequently that the assured were entitled to recover the 663*l.* 2*s.* 10*d.* Harris *v.* Scaramanga - - - - - - **481**

FRANCHISE—Parliamentary **143, 150, 158, 163, 172, 178, 185, 190, 193, 198, 202, 212, 227**
See Vote for Parliament. **1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13.**

FRAUD—Liability—Bankruptcy - - **358**
See Liability incurred by Fraud.

FREEHOLD INTEREST—Title to vote - 202
See Vote for Parliament. 6.

FREIGHT—*Marine Insurance—Valued Policy on Freight—Passage Money—Mode of calculating Amount recoverable on Policy.*] The defendants underwrote for 1000*l.* a policy of marine insurance, expressed to be "upon chartered freight valued at 7000*l.* at and from Sydney to Calcutta and London." The risk was by the terms of the policy to commence from the loading of the said goods or merchandise and to continue until they were safely landed. Upon the arrival of the ship at Calcutta the voyage to England was abandoned in consequence of the failure of the charterers, and the ship was employed for the conveyance of 360 coolies and 1200 bags of rice to the Mauritius. Upon learning this the plaintiff, the assured, procured an alteration of the policy, by the insertion of a memorandum in the margin, altering the voyage and declaring the interest to be on freight valued at 2000*l.* The intention of the plaintiff in effecting this insurance was to insure the freight of the rice only, but this intention was not communicated to the defendants. No binding custom of trade limiting the meaning of the term freight was proved; but the most frequent course in insurance business, where freight of coolies is intended, is to describe it as freight of coolies, or passage money of coolies, or by some other term distinguishing it from freight of merchandise. The rate of premium differs for the insurance of passage money of coolies and freight of goods. The ship was wrecked, and there was a total loss of the rice, and consequently of the freight of the rice, but the coolies, with the exception of twelve, were saved, and their passage money, which was payable on arrival, paid. The plaintiff sued the defendants to recover, as on a total loss, the amount underwritten, being the half of the total value declared in the policy. The defendants contended that there was only a partial loss, as the freight or passage money of coolies must be taken to be included in the term "freight" used in the policy:—*Held*, that the question, whether the term "freight" in a marine policy includes passage money, must depend upon the circumstances of each particular case, and the context of the particular policy; that, in the present case, the term "freight" did not include such passage money, and consequently there was a total loss of the freight insured by the policy: but that inasmuch as the valuation of freight in a valued policy primâ facie refers to a full cargo, or the charter of the entire ship, and there was in this case nothing to shew the underwriter that the valuation was less than such full freight, the valued policy as applicable to a partial cargo must be treated as an open policy for half the loss of freight, not exceeding in any case 1000*l.* Denoon *v.* The Home and Colonial Assurance Co. 341

FRIENDLY SOCIETY — *Treasurer withholding Moneys of the Society*—18 & 19 *Vict. c.* 63, *s.* 24.] To render the treasurer of a friendly society liable to the penalties imposed by s. 24 of 18 & 15 Vict. c. 63, for "withholding or misapplying" moneys of the society which have come to his hands as treasurer, it must be shewn that he has been guilty of some fraud or misrepresentation. Mere inability to pay over the money to the trustee is not enough. Barrett *v.* Markham - 405

GAZETTE—Evidence—Bankruptcy - 300
See Bankruptcy Jurisdiction.

GOODS, SALE OF—Sample—Right to reject
See Sale by Sample. [438

GROSS, COMMON IN—Severance - - 592
See Common in Gross.

"HOUSE" - - - - 143, 150
See Vote for Parliament. 1, 2.

INDEMNITY AGAINST CALLS—*Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *ss.* 38, 160—*Winding up—Compromise by Transferee of Shares with Liquidator—Liability to Transferror in respect of future Calls.*] The discharge of a contributory in Class A., under s. 160 of the Companies Act, 1862 (25 & 26 Vict. c. 89), does not release him from his implied contract to indemnify the transferror, who has been placed as a contributory in Class B., the company having been wound up within twelve months after the transfer. The defendant, a holder of shares at the date of the winding-up of a company, being unable to pay the calls in full, an agreement was entered into between him and the liquidator, with the sanction of the Court, by which a certain sum and a transfer of all the contributory's interest in the company were to be accepted by the liquidator in full discharge of all calls, claims, &c., which the company or the liquidator had or thereafter might have against him. The agreement contained a proviso that "nothing herein contained shall in any way prejudice or affect the rights or remedies of the company, or the liquidator or the creditors thereof, against any other contributories of the company, whether as present or past members thereof or otherwise, and that the liability of such members to contribute to the assets of the company shall remain the same as if this agreement had not been made, save only to the extent of the sum paid" under the agreement. Subsequently, the name of the plaintiff, the former holder of the defendant's shares, was placed upon the list of (Class B.) contributories, as a past member,—the winding-up of the company having taken place within twelve months after the registration of the transfer to the defendant:—*Held*, that the compromise with the liquidator did not absolve the defendant from his implied contract to indemnify the plaintiff against future calls. The relation between the transferror and transferee is not that of principal and surety, but one of primary and secondary liability. Roberts *v.* Crowe - - - - - - 629

INHERENT VICE—Animal—Carrier - 655
See Carrier of Animals.

INJURIOUS AFFECTION—Compensation - 503
See Compensation under Lands Clauses Act. 2.

INSPECTION OF DOCUMENTS - 127, 352
See Production of Documents.

INSURABLE INTEREST—Fire insurance - 25
See Bailment in Trust.

INTEREST, INSURABLE—Fire insurance - 25
See Bailment in Trust.

INTERROGATORIES—*Privileged Communication—Hearsay Information—Information obtained for the purposes of Litigation.*] In an action by a principal against his agent, for negligence in the purchase of certain goods for the principal, the defendant being interrogated touching certain matters connected with such purchase not within his own knowledge, but known to his partner at New York, declined to answer on the ground of ignorance as to such matters. Further interrogatories being administered, touching the same matters, he answered, stating that since action brought, certain communications had passed between him and his firm at New York, with a view to his defence to the action, and that all his information as to the matters in question was derived from such communications, and submitting that he was privileged from disclosing such communications:—*Held*, on an application to the Court to compel him to make further answer to the interrogatories, that he was so privileged, and that the application must be refused. Phillips *v.* Routh - - - - - 287

IRREGULARITY—Affidavit—Waiver **Ex. Ch.** 77
See Waiver of Irregularity.

JOINT AND SEVERAL NOTE—Surety—Set-off
See Equitable Set-off. [372

JUDGE, DUTY OF—Written contract **Ex. Ch.** 530
See Shipment in June or July.

JUDGE'S NOTES—Bespeaking - - 138
See Evidence to vary written Contract.

JUDGMENT AGAINST ONE OF SEVERAL—*Effect of a Judgment in an Action against one of several joint Tortfeasors.*] A judgment in an action against one of several joint tortfeasors is a bar to an action against the others for the same cause, although such judgment remains unsatisfied. Brinsmead *v.* Harrison - **Ex. Ch.** 547

JUDGMENT IN TROVER - - **Ex. Ch.** 547
See Judgment against one of Several.

JUDICIAL PROCEEDING—Privilege—Libel 261
See Obscene Libel.

JURISDICTION—Bankruptcy - - 519
See Composition.

—— County Court—Admiralty - - 290
See County Court Jurisdiction.

—— County Court—Bankruptcy - - 300
See Bankruptcy Jurisdiction.

JURY, DUTY OF—Written contract - **Ex. Ch.** 530
See Shipment in June or July.

LANDLORD AND TENANT—Assignment - 505
See Covenant not to Assign.

—— Custom of country - - - 242
See Custom of Country.

—— Encroachment - - - - 1
See Encroachment.

—— Forfeiture—Waiver - - - 360
See Waiver of Forfeiture.

—— Payment of rent - - - 132
See Prepayment of Rent.

LANDS CLAUSES CONSOLIDATION ACT—Compensation - - - 18, 508
See Compensation under Lands Clauses Act. 1, 2.

LANDS INJURIOUSLY AFFECTED—Compensation - - - - - 508
See Compensation under Lands Clauses Act. 2.

LEASE—Assignment - - - 505
See Covenant not to assign.

—— Forfeiture—Waiver - - - 360
See Waiver of Forfeiture.

LETTERS-PATENT—Negligence - - 121
See Evidence of Negligence.

LEVANCY AND COUCHANCY—Common - 592
See Common in Gross.

LIABILITY INCURRED BY FRAUD—*Attorney—Costs—Action brought without Authority—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 49.] An attorney, having brought an action without any authority to do so from the plaintiff, was ordered to pay the defendant's costs of the action:—*Held*, that his liability to pay such costs was a liability incurred by means of a fraud within the 49th section of the Bankruptcy Act, 1869. Jenkins *v.* Fereday - - - - - 358

LIABILITY OF ARBITRATOR 32, **Ex. Ch.** 525
See Arbitrator.

LIBEL, OBSCENE - - - - 261
See Obscene Libel.

LIBEL—Privilege—Public matter - - 606
See Privileged Communication.

LIMITATIONS, STATUTE OF—Encroachment 1
See Encroachment.

LIQUIDATION—Sale of debts - - 473
See Sale of Bankrupt's Debts.

LOSS, PARTIAL—Stranding - - 570
See Stranding.

LOSS, TOTAL—Stranding - - - 570
See Stranding.

LUNATIC—*Pauper Criminal Lunatic—Obligation of Guardians to maintain in Asylum*—3 & 4 *Vict. c.* 54, *s.* 2—*Parol Contract for Maintenance of Lunatic.*] The 2nd section of the 3 & 4 Vict. c. 54, provides that, in the case of a pauper criminal lunatic removed to an asylum, an order of justices may be made on the guardians of the union comprising the parish of the lunatic's settlement to pay a weekly sum for the maintenance of such lunatic in the asylum:—*Held*, that this section imposing on the guardians the duty of paying for the maintenance of such lunatic, it is competent for them to waive the provision requiring an order of justices, and agree to pay a weekly sum for the maintenance of the lunatic without any order.—A criminal lunatic having been removed to a private asylum under a warrant of the secretary of state in pursuance of 3 & 4 Vict. c. 54, the guardians of the L. union, to which the lunatic was chargeable, paid to the proprietor of such asylum the sum of 16s. a week for the maintenance of the lunatic for fourteen years, though it did not appear that any order of

LUNATIC—*continued.*
justices was ever made against them:—*Held*, that under these circumstances, inasmuch as the proprietor of the asylum was bound to keep the lunatic until removed from his custody in due course of law, it might be inferred that the guardians had, before the lunatic was received into the asylum, without an order of justices, entered into an agreement with the proprietor to pay the sum of 16*s.* a week for the maintenance of the lunatic in the asylum until she was removed thence, and that they could not withdraw from such agreement. Pegge *v.* Guardians of the Lampeter Union - - - - - - 366

LUNATIC ASYLUM - - - - 366
See Lunatic.

MAINTENANCE OF LUNATIC - - 366
See Lunatic.

MARINE INSURANCE—Average foreign statement - - - - 481
See Foreign Average Statement.

—— Freight - - - - - 341
See Freight.

—— Misrepresentation - - - 65
See Misrepresentation of material Fact.

—— Partial loss - - - - 570
See Stranding.

MARKET, CUSTOM OF - - Ex. Ch. 84
See Custom of Market.

MASTER AND SERVANT—Cab-owner - 272
See Cab-owner.

—— Tort of servant - - - - 415
See Tort of Servant.

—— Weekly hiring—Evidence - - 138
See Evidence to vary written Contract.

MATERIAL FACT—Misrepresentation - 65
See Misrepresentation of material Fact.

MEASURE OF DAMAGE—Contract—Carrier 583
See Damage for Breach of Contract.

"MERCHANDISE IN TRUST OR ON COMMISSION FOR WHICH THE ASSURED ARE RESPONSIBLE" - - - - - 25
See Bailment in Trust.

MISREPRESENTATION OF MATERIAL FACT—*Marine Insurance.*] On effecting an insurance on freight from Belize to R. Point on the Honduras coast (a place the exact locality of which was not known to either party), and then to London, the agent of the assured produced and read to the agent of the assurers a letter which the owners of the vessel had received from the captain from Belize, in which R. Point was thus described:—"It is considered by the pilot here as a good and safe anchorage, and well sheltered. I have been out and seen the place, and consider it quite safe." It was admitted that this statement of the captain was made bonâ fide; but there was evidence that R. Point was not at the particular season a safe anchorage.—In an action upon the policy, for a total loss, the judge told the jury

MISREPRESENTATION OF MATERIAL FACT—*continued.*
that in his opinion the letter did not amount to a statement of a fact, but merely of an opinion; and he left two questions to them,—1. Was the letter read to D., the agent of the assured? 2. Did the captain and the pilot consider that R. Point was a safe anchorage? The jury answered both questions in the affirmative, and a verdict was entered for the plaintiffs:—*Held*, no misdirection, and that the verdict was warranted by the evidence. Anderson *v.* Pacific Fire and Marine Insurance Company - - 65

MODUS—Tithes—Tillage - - Ex. Ch. 72
See Tillage.

MOORINGS—Occupation—Poor-rate - 499
See Occupation for Poor-rate.

MORTGAGE—Fisheries - - Ex. Ch. 328
See Fixtures.

—— Pre-payment of rent to mortgagee - 132
See Pre-payment of Rent.

NEGLIGENCE—Bailee—Animals - - 78
See Evidence of Negligence. 1.

—— Carrier—Animals - - - 655
See Carrier of Animals.

—— Carrier of passengers - - Ex. Ch. 321
See Evidence of Negligence. 3.

—— Corporation for public purposes - 458
See Corporation for Public Purposes.

—— Patent agent - - - - 121
See Evidence of Negligence. 2.

NET YEARLY VALUE—Title to vote - 185
See Vote for Parliament. 5.

NOTICE—Carrier—Measure of damage - 583
See Damages for Breach of Contract.

—— Mortgage—Pre-payment of rent - 132
See Pre-payment of Rent.

NOTICE OF CLAIM—Sufficiency - - 172
See Vote for Parliament. 11.

NOTICE OF OBJECTION—Description of objectors - - - - 178
See Vote for Parliament. 13.

—— Statements of grounds - - 190
See Vote for Parliament. 12.

NOTICE OF SHIP'S ARRIVAL—*Shipping—Construction of Charterparty—Notice of Ship's Arrival at a particular Dock, and Readiness to receive Cargo.*] In an action by a ship-owner against the charterers for not loading a cargo of coals pursuant to a charterparty by the terms of which the owner engaged that the vessel, then in the port of Sunderland, being tight, &c., should with all possible dispatch proceed direct to the South Dock, Sunderland, and there load, in the usual and customary manner, at any one of the collieries the freighters might name, a full cargo of coals, &c., which the freighters bound themselves to ship by a given day, for Calcutta,—the defendants pleaded that they had not any notice of the ship having proceeded to and having arrived at the South Dock, and of her being ready to receive cargo, wherefore they did not nor could load:—*Held*; that the allegation in the plea must be treated as an allegation of fact, meaning that by

NOTICE OF SHIP'S ARRIVAL—*continued.*
reason of want of notice of the ship's arrival at the dock and being ready to load, the defendants were prevented loading her; and that, so read, the plea was an answer to the action. Stanton *v.* Austin - - - - - 651

NUISANCE—Damage—Remoteness - 253
See Proximate Cause of Injury.

OBSCENE LIBEL—*Misdemeanour—Seizure and destruction of obscene Books under 20 & 21 Vict. c. 83, s. 1—Report of Judicial Proceedings—Privilege.*] A police magistrate had ordered the destruction of copies of a pamphlet, which the appellant kept at his shop for sale, as obscene books, under 20 & 21 Vict. c. 83, s. 1. This pamphlet was a substantially correct report of the trial of one G. M., on an indictment for a misdemeanour in selling a certain obscene work called the "Confessional Unmasked;" but it set out that work in full, whereas at the trial it was taken as read, and passages in it only referred to:—*Held* (following the decision in *Reg.* v. *Hicklin* (Law Rep. 3 Q. B. 360)), that the pamphlet, being of such a character that it would necessarily tend to the depravation of the public morals, was an obscene book within 20 & 21 Vict. c. 83, even although the object of those publishing it were to suppress a system they thought immoral and pernicious:—*Held*, also (following the decision in *Rex* v. *Carlile* (3 B. & A. 167), that the privilege given by the law to reports of judicial proceedings does not extend to reports which contain matters of an obscene and demoralising character, and that the case was therefore within 20 & 21 Vict. c. 83, and the decision of the magistrate correct. Steele *v.* Brannan - - 261

OCCUPATION FOR POOR-RATE—*Moorings, Liability of—Easement.*] The appellants were possessed of a derrick for loading and unloading (but not storing) coals in the river Thames, which was moored within the parish of Greenwich under a licence from the conservators, in the following manner, viz. by two single-fluked anchors on the side nearest the shore, and by two stones on the channel side, and by two stream-anchors one at the head and the other at the stern. The anchors and stones (which could be hauled on board by the machinery on the derrick) were merely dropped into the river, no force being used for the purpose of fastening them, but only a small quantity of ballast being removed in the bed of the river to enable the stones to lie flat. The derrick was always afloat, and was subject to be moved to any other part of the river, at the pleasure of the conservators:—*Held*, that the appellants were not liable to be rated to the relief of the poor in respect of these "moorings." Cory *v.* Churchwardens of Greenwich - - - 499

OCCUPATION—Under different landlords 193
See Vote for Parliament. 8.

OFFERTORY — *Ecclesiastical Law — Duty of Churchwardens—Molesting a Clergyman whilst celebrating Divine Service—23 & 24 Vict. c. 32, s. 2.*] Upon an information under 23 & 24 Vict. c. 32, s. 2, against the respondents, for unlawfully molesting the appellant, "then being a clergyman in holy orders celebrating Divine service" in the parish church, the evidence was that the appellant (the incumbent), whilst engaged in collecting the offertory during the reading of the offertory sentences by another clergyman, was obstructed by the respondents, who claimed as churchwardens the right of themselves collecting. The magistrates decided that the respondents had not been guilty of the offence charged, inasmuch as the appellant was not at the time he was so obstructed "ministering or celebrating any sacrament or any Divine service, rite, or office:"—*Held*, that their decision was right,—the duty of collecting the offertory being a lay duty imposed by the rubric upon the "deacons, churchwardens, or other fit person" (of lower degree) "appointed for that purpose." Cope *v.* Barber - 393

OMISSION OF ADDITION OF DEPONENT—Affidavit - - - - - 77
See Waiver of Irregularity.

"PARISH OR PLACE"—*Beerhouse — Time of closing under 3 & 4 Vict. c. 61, s. 15.*] Teignmouth is divided into two parishes, viz. East Teignmouth and West Teignmouth. The former contains less than 2500 inhabitants: but the two together contain more than that number:—*Held*, that Teignmouth was a "place" in which a beershop might lawfully be kept open until 11 p.m., under the provisions of 3 & 4 Vict. c. 61, s. 15, and therefore that the appellant, whose house was situate in East Teignmouth, was not liable to be convicted under that section for keeping it open after 10 p.m. Rice *v.* Slee - - 378

PARLIAMENT 143, 150, 158, 163, 172, 178, 185, [190, 193, 198, 202, 212, 227
See Vote for Parliament. 1, 2, 3, 4, [5, 6, 7, 8, 9, 10, 11, 12, 13.

PAROL EVIDENCE—Written contract - 138
See Evidence to vary written Contract.

PARTIAL LOSS—Stranding - - 570
See Stranding.

PARTNER—Lease—Assignment - 505
See Covenant not to assign.

PASSAGE MONEY—Freight—Insurance 341
See Freight.

PASSENGER — Railway company — Negligence [**Ex. Ch. 321**
See Evidence of Negligence. 3.

PATENT—Negligence - - - 121
See Evidence of Negligence. 2.

PATENT AGENT—Negligence - - 121
See Evidence of Negligence. 2.

PAUPER LUNATIC—Maintenance - 366
See Lunatic.

PAYMENT OF RATES - - - 158, 227
See Vote for Parliament. 3, 4.

"PLACE" - - - - - 378
See "Parish or Place."

PLAINTIFF—Adding of—Amendment - 409
See Adding Plaintiff.

PLEADING—Departure—Sale of debts 473
See Sale of Bankrupt's Debts.

POLICY—Fire insurance—Bailee - - 25
See Bailment in Trust.

POOR LAW—Criminal lunatic—Maintenance 366
See Lunatic.

POOR-RATE—Occupation—Moorings - 499
See Occupation for Poor-rate.

PRACTICE, COMMON LAW—Amendment 409
See Adding Plaintiff.

—— Bespeaking judge's notes - - 138
See Evidence to vary written Contract.

—— Inspection - - - . 127, 352
See Production of Documents. 1, 2.

PRE-PAYMENT OF RENT—*Mortgage—Notice of Grant within* 4 *Anne, c.* 16, *s.* 10.] In July, 1864, L. demised premises to defendant for five years at a rent of 55*l.* per annum, payable quarterly. Immediately after the grant of the lease, defendant advanced to L. 170*l.* on account of rent; and in September, 1865, L. mortgaged the premises to plaintiff.—In May, 1866, B., who claimed under a prior mortgage from L. dated in September, 1858, through C., his attorney, commenced an action of ejectment against defendant to recover possession of the premises, but did not proceed with it; and on the 1st of November, 1866, plaintiff's attorney wrote to defendant: "Mr. C. has written to say his clients are no longer entitled to receive your rent. I therefore request that you will have the kindness to pay the same here by Monday next:"—*Held*, that the pre-payment of rent was no bar to plaintiff's claim to the rent accruing after defendant had notice that plaintiff was grantee of the reversion; and that the above letter, coupled with the circumstances known to defendant (that he was raising money by mortgaging his reversion, and that the plaintiff's claim, for rent, could hardly be founded upon any other alleged right than one resulting from a grant of the reversion), would warrant a jury in inferring that defendant had notice that plaintiff was such grantee. Cook *v.* Guerra - - 132

PRESCRIPTION—Common - - 592
See Common in Gross.

PRIVILEGED COMMUNICATION — *Libel — Fair Criticism on a Matter of "public and national Importance."*] The fair and honest discussion of or comments upon a matter of public interest is in point of law privileged, and is not the subject of an action, unless the plaintiff can establish malice.—The plaintiff, a naval architect, in 1867 submitted to the Admiralty proposals for the conversion of the old wooden line-of-battle ships of the navy into ironclad turret-ships. His proposals were considered by the Admiralty, and rejected. In September, 1870, the ironclad turret-ship *Captain*, whilst on a cruize capsized and sunk with all hands. This disaster caused great excitement and anxiety in the public mind; and, with a view to explain the circumstances under which the *Captain* had been sent to sea, as well as the general course pursued by the Board with reference to the placing the navy in a proper condition to meet the exigencies of modern naval warfare, a minute was prepared by the first Lord of the Admiralty for presentation to parliament during the approaching session. This minute referred to and criticised the plans of conversion proposed by the plaintiff; and in a note was inserted a letter upon the subject addressed to the Board in

PRIVILEGED COMMUNICATION—*continued.*

September, 1867, by Sir Spencer Robinson, then controller of the navy, which letter contained this passage:—"These plans would have no weight whatever from the known antecedents of their author, but they derived weight from the approval of Mr. Watts, the late chief-constructor of the navy," and concluded by recommending their rejection. The minute was by order of the Lords of the Admiralty printed by the defendant, the Queen's printer; and copies of it were publicly sold by him *before the meeting of parliament.* At the trial of an action for this alleged libel, the judge,—assuming the letter to be primâ facie libellous, and it being conceded that the publication was without malice,—nonsuited the plaintiff, on the ground that it was a fair criticism upon a matter of public and national importance, and therefore privileged:—*Held*, by Willes, Byles, and Brett, JJ., that the nonsuit was right.—*Held*, by Grove, J., that the publication was not privileged as being of public and national importance or interest, within the limits marked by previous decisions; and that it was not in the nature of a fair criticism of matter before the public, or at all events, that it was not so clearly within the limits of such privilege as to be removed from the consideration of a jury. Henwood *v.* Harrison 606

—— Discovery - - - - 287
See Interrogatories.

—— Obscene libel - - - - 261
See Obscene Publication.

PRODUCTION OF DOCUMENTS—*Practice.*] In an action at the suit of a passenger against the agents to a ship, for alleged false and fraudulent representations as to the character, accommodation, and qualities of the ship, the Court refused to allow the plaintiff to inspect letters from other passengers to the defendants, complaining of the condition of the ship, and refusing to proceed in her (some of which complaints had been met by a return of part of the passage-money), and also letters from the captain and the owner written after such complaints.—The mere fact that such letters might afford materials for a cross-examination of the defendants' witnesses, is no ground for inspection. Richards *v.* Gellatly - - - 127

2. —— *Practice—Costs of*—14 & 15 *Vict. c.* 99, *s.* 6—*Common Law Procedure Act*, 1854, *s.* 50.] The general rule of practice with regard to the inspection of documents is that the costs of inspection must be paid by the party inspecting, though, *semble,* that, under exceptional circumstances, such costs may be made costs in the cause. Republic of Peru *v.* Weguelin - - 352

PROHIBITION—County Court - - 290
See County Court Jurisdiction.

PROPERTY PASSING—Insurance - - 25
See Bailment in Trust.

—— Sale of goods - - - - 438
See Sale by Sample.

PROXIMATE CAUSE OF INJURY—*Nuisance—Washing Cart on a Highway, in Breach of a Statute—Proximate Damage*—2 & 3 *Vict. c.* 47, *s.* 54, *sub-s.* 1.] The defendant's servant (in breach of the Police Act, 2 & 3 Vict. c. 47, s. 54) washed

PROXIMATE CAUSE OF INJURY—*continued.*

a van in a public street, and allowed the waste water to run down the gutter towards a grating leading to the sewer, about twenty-five yards off. In consequence of the extreme severity of the weather, the grating was obstructed by ice, and the water flowed over a portion of the causeway, which was ill paved and uneven, and there froze. There was no evidence that the defendant knew of the grating being obstructed. The plaintiff's horse, while being led past the spot, slipped upon the ice and broke its leg:—*Held*, that this was a consequence too remote to be attributed to the wrongful act of the defendant. Sharp *v.* Powell [253

PUBLIC PURPOSE—Corporation - - 458
See Corporation for public Purposes.

QUALIFICATION—Description 143, 150, 163
See Vote for Parliament. 1, 2, 10.

RAILWAY COMPANY—Bailee—Animals 78
See Evidence of Negligence. 1.

—— Carrier—Animals - - - 655
See Carrier of Animals.

—— Passengers - - - Ex. Ch. 321
See Evidence of Negligence. 3.

—— Tort of servant - - - - 415
See Tort of Servant.

RAILWAY—Toll—Carriage of goods - 555
See Toll Traverse.

RATES—Occupation—Moorings - - 499
See Occupation for Poor-rate.

—— Payment by landlord - - 158, 227
See Vote for Parliament. 3, 4.

—— Separate rating - - - - 193
See Vote for Parliament. 8.

RATIFICATION—Act of directors - - 43
See Director's Authority.

REFORM ACT, 1832 - 143, 150, 158, 198, 227
See Vote for Parliament. 1, 2, 3, 4, 9.

REG. GEN.—Hilary Term, 1853, Reg. 138 77
See Waiver of Irregularity.

REGISTRATION ACT, 1843 - - 163, 172
See Vote for Parliament. 10, 11.

RELEASE—Rights against sureties - - 9
See Covenant not to sue.

REMOTENESS OF DAMAGE—Action - 253
See Proximate Cause of Injury.

RENT—Distress—Waiver of forfeiture - 360
See Waiver of Forfeiture.

—— Pre-payment—Mortgage - - 132
See Pre-payment of Rent.

REOPENING VALUATION—Valued policy 341
See Freight.

REPRESENTATION OF THE PEOPLE ACT, 1867
[143, 158, 172, 178, 193, 198, 227
See Vote for Parliament. 1, 3, 4, 8, 9, 11, 13.

RESERVATION OF RIGHT AGAINST SURETY 9
See Covenant not to sue.

SALE BY SAMPLE—*Right to reject Goods not in accordance with Contract, and recover Price paid for them—Acceptance.*] The defendants being shoe manufacturers contracted with the plaintiffs to supply 30,000 black army shoes as per sample, to be delivered free at a wharf, to be inspected and quality approved before shipment, and payment to be made in cash at the time of each delivery. It was well known to the defendants that the shoes were required for the French army for a winter campaign. A sample shoe was deposited, and a large number of shoes having been inspected and approved by the plaintiffs' agent under the contract, invoices for such shoes were made out and signed by the plaintiffs' agent, and the shoes were then sent to Fenning's Wharf, London, which had been named by the plaintiffs as the place for delivery. On the inspection of the shoes the soles were not opened, and without opening them it was impossible to tell what the "fillings" of the soles consisted of. The shoes were paid for by the plaintiffs, and forwarded by them to Lille, for the purpose of meeting a contract entered into with the French government for the supply of shoes for the French army. Circumstances had in the mean time occurred which gave rise to suspicions on the part of the plaintiffs that the shoes so forwarded might contain paper in the soles; and the defendants knowing at that time that the shoes were intended to be sent to Lille under a contract for the supply of shoes to the French army, and would have to be passed by the French authorities there, signed a letter to the plaintiffs agreeing to take back the shoes that might be thrown on their hands in consequence of paper being found in them, it being understood that they would not take back any large number of shoes if paper should be found in only a few pairs. The shoes were tendered to the French authorities at Lille, and rejected because a great number of pairs were found on being opened to contain paper. A considerable number of the shoes being afterwards opened, a very large proportion of those so opened were found to contain paper in the soles. Shoes with paper in the sole are not fit for army shoes. A small quantity of shoes, which had been inspected and approved under the contract, and the price of which had been paid, had been delivered at Fenning's Wharf and not forwarded to Lille. The plaintiffs gave notice to the defendants that they rejected the shoes delivered, and refused to receive any more, and brought an action against the defendants for breach of contract, claiming to be entitled to throw the shoes already delivered under the contract upon the defendants' hands at Lille and at Fenning's Wharf, and to recover (inter alia) the amount of the price of the shoes. The jury found at the trial that the defects in the shoes could not have been discovered by any inspection which ought reasonably to have been made:—*Held*, that the letter of the defendants must be treated as a new and additional contract between the parties, adding fresh terms to the original contract with reference to the difficulties that were likely to arise with the French authorities at Lille, and upon the proper construction of the whole contract, including the letter, the plaintiffs were entitled to throw the shoes on the defendants' hands at Lille and at Fenning's Wharf, and recover the price of them.—Per Bovill, C.J., and Byles, J., but for the letter, and under the

SALE BY SAMPLE—*continued.*

SALE BY SAMPLE—*continued.*
contract as it originally stood, the plaintiffs could not have rejected the shoes and recovered the price of them, having accepted them and dealt with them as their own property.—Per Brett, J. Apart from the special agreement contained in the letter, the plaintiffs would have been entitled to return the shoes on the defendants' hands at Lille, and to recover the price of them, inasmuch as the inspection in London was ineffectual by reason of a latent defect for which the defendants as manufacturers of the shoes were responsible, and the shoes were rejected immediately upon opportunity occurring for the discovery of such defect. HEILBUTT *v.* HICKSON. - - - - 438

SALE OF BANKRUPTS' DEBTS—*Bankrupt—Liquidation—32 & 33 Vict. c. 71, s. 15, sub-s. 3; s. 111; s. 125, sub-s. 5—Pleading—Departure.*] To an action for goods sold, &c., the defendant pleaded that since the cause of action arose, and before action, the estate of the plaintiff went into liquidation under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71) and one B. was duly appointed trustee. The plaintiff replied that B. for good and valuable consideration sold, assigned, and transferred to him all the estate, causes of action, &c., vested in B. as trustee under the liquidation:—*Held*, that the sale was warranted by s. 25, sub-s. 3, of the Act, and the plaintiff entitled to sue in his own name, under s. 111; and that the replication was no departure from the declaration. KITSON *v.* HARDWICK - - - 473

SALE OF GOODS—Sample—Right to reject 438
See SALE BY SAMPLE.

—— Shipment - - - Ex. Ch. 530
See SHIPMENT IN JUNE AND [OR] JULY.

—— Quality—Broker - - 32, Ex. Ch. 525
See ARBITRATOR.

SAMPLE, SALE BY—Right to reject - 438
See SALE BY SAMPLE.

SCOPE OF EMPLOYMENT—Servant—Tort 415
See TORT OF SERVANT.

SEAWORTHINESS—Warranty—Charterparty [421
See WARRANTY OF SEAWORTHINESS.

FORFEITURE—Waiver—Distress - - 360
See WAIVER OF FORFEITURE.

SET-OFF—Bankruptcy—Premium - 570
See STRANDING.

—— Equitable - - - - 372
See EQUITABLE SET-OFF.

SHARES—Transfer—Calls - - - 629
See INDEMNITY AGAINST CALLS.

SHIP—Charterparty—Notice of arrival - 651
See NOTICE OF SHIP'S ARRIVAL.

—— Charterparty—Seaworthiness - 421
See WARRANTY OF SEAWORTHINESS.

—— Contract—County Court jurisdiction 290
See COUNTY COURT JURISDICTION.

—— Insurance—Foreign average statement 481
See FOREIGN AVERAGE STATEMENT.

—— Insurance—Freight - - - 341
See FREIGHT.

—— Insurance—Stranding - - 570
See STRANDING.

SHIPMENT IN JUNE AND [OR] JULY—*Construction of mercantile Contract—Duty of Judge and Jury.*] The defendant contracted for the purchase of a large quantity of Danubian maize "fair average quality of the season and port of shipment when shipped. To be shipped from Danube, &c., by three or more first-class vessels. For shipment in June and [or] July, 1869 (old style), seller's option," &c. In fulfilment of the contract on the part of the seller two cargoes of maize were tendered to the defendant, the bills of lading for which were dated respectively the 4th and 6th of June, 1869. The loading of these two cargoes was commenced respectively on the 12th and 16th of May, and completed on the 4th and 6th of June; somewhat more than the half of each cargo having been put on board in May. There was evidence that grain shipped in May was more likely to damage by heating than grain shipped in June.—It was left to the jury to say whether in their opinion the cargoes in question were "June shipments" in the ordinary business sense of the term; and they found that they were. The judge was of the same opinion, and directed a verdict for the plaintiff:—*Held*, in the Exchequer Chamber, by Martin, B., Blackburn, Mellor, and Lush, JJ., Kelly, C.B., dubitante,—affirming the judgment of the Court of Common Pleas,—that the conclusion was right.

Held, also, by Martin, B., and Lush, J., Kelly, C.B., and Blackburn, J., dubitantibus, that the question was one for the jury. ALEXANDER *v.* VANDERZEE. - - - - Ex. Ch. 530

STAMPING WEIGHT AND MEASURES - 383
See WEIGHTS AND MEASURES.

STATUTES.
8 Hen. 6, c. 7 - - - 185, 212
See VOTE FOR PARLIAMENT. 5, 7.
4 Anne, c. 16, s. 10 - - - 132
See PRE-PAYMENT OF RENT.
54 Geo. 3, c. 170, s. 11 - - - 227
See VOTE FOR PARLIAMENT. 4.
2 Wm. 4, c. 45 - 143, 150, 158, 198, 227
See VOTE FOR PARLIAMENT. 1, 2, 3, 4, 9.
3 & 4 Wm. 4, c. 27, s. 7 - - 1
See ENCROACHMENT.
2 & 3 Vict. c. 47, s. 54, sub-s. 1. - 253
See PROXIMATE CAUSE of INJURY.
3 & 4 Vict. c. 54, s. 2 - - - 366
See LUNATIC.
—— c. 61, s. 15 - - - - 378
See "PARISH OR PLACE."
4 & 5 Vict. c. 35 - - - - 639
See ENFRANCHISEMENT OF COPYHOLDS. 2.
5 & 6 Wm. 4, c. 63, s. 21 - - 383
See WEIGHTS AND MEASURES.
6 Vict. c. 18, s. 40 - - - 150
See VOTE FOR PARLIAMENT. 2.
—— c. 18, ss. 15, 40 - - 163, 172
See VOTE FOR PARLIAMENT. 10, 11.
8 Vict. c. 18, s. 121 - - - 18
See COMPENSATION UNDER LANDS CLAUSES ACT.
8 & 9 Vict. c. 18, s. 68 - - - 508
See COMPENSATION UNDER LANDS CLAUSES ACT.
10 & 11 Vict. c. cclxxx., s. 34 - - 18
See COMPENSATION UNDER LANDS CLAUSSE ACT.

STATUTES—*continued.*
12 & 13 Vict. c. 106, s. 171 - - 570
See Stranding.
14 & 15 Vict. c. 99, s. 6 - - 127, 352
See Production of Documents. 1, 2.
15 & 16 Vict. c. 51 - - 535, 639
See Enfranchisement of Copyholds. 1, 2.
18 & 19 Vict. c. 63, s. 24 - - 405
See Friendly Society.
—— c. 122, s. 49 - - - 386
See Surveyor's Fee.
19 & 20 Vict. c. 120 - - - 535
See Enfranchisement of Copyholds. 1.
20 & 21 Vict. c. 43 - - - 306
See Surveyor's Fee.
21 & 22 Vict. c. 94 - - - 639
See Enfranchisement of Copyholds. 2.
23 & 24 Vict. c. 32, s. 2 - - - 393
See Offertory.
—— c. 126, s. 19 - - - 409
See Adding Plaintiff.
24 & 25 Vict. c. 134 - - - 9
See Covenant not to sue.
—— c. 134, ss. 192, 197 - - 570
See Stranding.
25 & 26 Vict. c. 98, ss. 38, 160 - - 629
See Indemnity against Calls.
—— c. clxxxvi. - - - 555
See Toll Traverse.
28 Vict. c. 36, s. 6 - - - 190
See Vote for Parliament. 12.
30 & 31 Vict. c. 102 143, 158, 172, 178, 193, [198, 227
See Vote for Parliament. 1, 3, 4, 8, 9, 11, 13.
31 & 32 Vict. c. 71 - - - 290
See County Court Jurisdiction.
32 & 33 Vict. c. 51, s. 2 - - 290
See County Court Jurisdiction.
—— c. 71 - - - - 9
See Covenant not to sue.
—— —— ss. 11, 59, 71, 72, 80, 87 - 300
See Bankruptcy Jurisdiction.
—— —— ss. 15, 111, 125 - - 473
See Sale of Bankrupt's Debts.
—— —— s. 49 - - - - 358
See Liability incurred by Fraud.
—— —— s. 126 - - - - 519
See Composition.

STATUTE OF LIMITATIONS—Encroachment 1
See Encroachment.

STRANDING—*Marine Insurance—Partial Loss—Bankrupt suing as Trustee—Set-off of unpaid Premiums—12 & 13 Vict. c.* 106, *s.* 171—24 & 25 *Vict. c.* 134, *ss.* 192, 197.] A cargo of salt, worth together with pre-paid freight about 1900*l.*, was insured from Liverpool to Calcutta, the policy containing the usual memorandum warranting "corn, fish, salt, &c., free from average unless general or the ship be stranded." Having encountered bad weather, lost both her anchors, and had her masts cut away, the ship was taken in tow by salvors and placed on a bank out of the ordinary course of the voyage, where she lay on her port side for several tides, and sustained considerable further injury. The salt was landed in a damaged state, and the ship repaired, though at an expense which exceeded her value when repaired. About one-fifth of the salt might have been made saleable, but would have realized no profit.—Suits were instituted by the salvors in the Admiralty Court, and the salt sold under a decree, the entire proceeds being absorbed by the costs:—*Held*, that there was a partial loss of the salt, but not a total loss, the seizure and sale under the decree of the Admiralty Court not being a natural or necessary consequence of a peril insured against; and that there was a stranding within the meaning of the memorandum.—The assured had subsequently to the date of the policy executed a deed of inspectorship under the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, s. 192, and was suing on behalf of third persons who had made advances upon the shipping documents:—*Held*, that the plaintiff was entitled to recover, and that the underwriters were not entitled to set off the amount of a debt due from the plaintiff to them under the mutual credit clause (s. 171) of 12 & 13 Vict. c. 106. De Mattos *v.* Saunders - - - - 570

SURETY—Equitable set-off - - - 372
See Equitable Set-off.
—— Reservation of rights against - 9
See Covenant not to sue.

SUB-LESSEE—Lease for sixty years - 198
See Vote for Parliament. 9.

SURVEYOR'S FEE—*Building Act* (18 & 19 *Vict. c.* 122), *s.* 49—*Appeal under* 20 & 21 *Vict. c.* 43.] Under the Building Act (18 & 19 Vict. c. 122), s. 49, and the schedule thereto, the district surveyor is entitled to a fee of 10*s.* "for inspecting the arches or stone floors over or under public ways:"—*Held*, that, where a builder is employed to construct a series of arches for cellars under a public street or streets surrounding a vacant piece of land which is to be let for building, the district surveyor is entitled to a fee of 10*s.* in respect of each distinct building to which any given number of the arches is intended to be appropriated,—a matter of fact which is to be ascertained and determined by the magistrate before whom the fee is sought to be recovered.—*Held*, also, that the decision of the magistrate upon such a summons is the subject of an appeal under 20 & 21 Vict. c. 43, notwithstanding s. 106 (the appeal clause) of the Building Act. Power *v.* Wigmore 386

"TENEMENT" - - - - 212
See Vote for Parliament. 7.

THAMES EMBANKMENT ACT, 1862 - 508
See Compensation under Lands Clauses Act.

TILLAGE—*Tithes—Modus, Breach of—Conversion of Land into "Tillage," what amounts to—Garden and Orchard Accessories of a House.*] An award made under a private enclosure Act, commuting the tithes of a parish, set out the terms of a modus, preserved by the Act, by which certain lands in the parish were exempted from the payment of tithes in kind. By the terms of the modus, as set out, the exemption ceased during such time as the lands or any part thereof might be converted into "tillage," and the award provided that in such case the lands should be subject to a tithe rent-charge of a specified amount.

TILLAGE—*continued.*

A field of about an acre, which was among the lands subject to the modus, was dealt with as follows: A house was built upon a portion of it, and a further portion, to the extent of twenty-two perches, was at the same time converted into a garden by the then owner, who fenced off the house and garden from the rest of the field, the remaining portion being used as an orchard:—*Held*, affirming the judgment of the Court of Common Pleas, that the manner in which the field had been dealt with did not amount to a conversion of it, or any part of it, into "tillage." Vigar *v.* Dudman - - - - Ex. Ch. 72

TIMBER—Compensation—Copyhold—Enfranchisement - - - - 639
See Enfranchisement of Copyholds. 2

TITHES—Modus—Tillage - - Ex. Ch. 72
See Tillage.

TOLL—Nature of - - - - 555
See Toll Traverse.

TOLL TRAVERSE—*Brecon Markets Act*, 1862 (25 *&* 26 *Vict. c. clxxxvi*)—*Toll for Goods carried by Railway.*] Goods carried by a railway company upon their railway, or to their railway station, entirely upon land belonging to them, and not upon any highway or in the enjoyment of any easement or other right reserved by the former owners of the land or those under whom they claim, cannot be the subject of a claim to a toll thorough or a toll traverse arising either by prescription or grant.—Distinction between "toll thorough" and "toll traverse."—The Brecon Markets Act, 1862 (25 & 26 Vict. c. clxxxvi), vested in the market company certain tolls which had been immemorially received by the corporation of Brecon for cattle, goods, and carriages passing to, through, or from the borough. A railway company, under the sanction of an Act of Parliament passed in the same session, acquired land (not being a highway) on which they constructed a railway and station within the borough of Brecon, whence passengers, goods, and cattle were conveyed by other lines of railway to other places beyond the limits of the borough. The rights of the corporation and of the Market Company were expressly reserved by the Railway Act, but there was no provision either in that or in the Railway Act enabling them to levy tolls on the railway:—*Held*, that the Brecon Markets Company were not entitled to toll in respect of cattle, goods, or carriages passing along the railway.—Whether they could claim toll on cattle or goods finding their way from the railway station to the streets of the borough,—*quære?* The Brecon Markets Company *v.* The Neath and Brecon Railway Company - - - - - - 555

TOLLS—Bridge—Title to vote - - 212
See Vote for Parliament. 7.

TOTAL LOSS—Stranding - - - 570
See Stranding.

TORT OF SERVANT—*Master and Servant—Railway Company—Responsibility of, for Act of Servant—Scope of Employment.*] A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances which arise, when an act of that class is to be done, and trusts him for the manner in which it is done; consequently he is answerable for the wrong of the person so intrusted, either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done, provided that what is done is not done from any caprice of the servant, but in the course of the employment.—The plaintiff, a passenger on the defendants' line of railway, sustained injuries in consequence of being violently pulled out of a railway carriage by one of the defendants' porters, who acted under an erroneous impression that the plaintiff was in the wrong carriage. The defendants' bye-laws did not expressly authorize the company's servants to remove any person being in a wrong carriage, but they provided that no person should be allowed to enter any carriage or to travel therein without having first paid his fare and taken a ticket. They likewise provided that the porters should act under the orders of the station-master, &c., and do all in their power to promote the comfort of the passengers and the interests of the company:—*Held*, that the act of the porter in pulling the plaintiff out of the carriage was an act done within the course of his employment as the defendants' servant, and one for which they were therefore responsible. Bayley *v.* The Manchester, Sheffield, and Lincolnshire Railway Company - - - - - - 415

TOWING PATH—Repair—Corporation - 458
See Corporation for public Purposes.

TRADE—Execution—Act of bankruptcy - 300
See Bankruptcy Jurisdiction.

TRANSFER OF SHARES—Calls—Indemnity 629
See Indemnity against Calls.

TREASURER OF FRIENDLY SOCIETY - 405
See Friendly Society.

TROVER—Judgment - - Ex. Ch. 547
See Judgment against one of Several.

TWELVE POUND OCCUPIER - 172, 193
See Vote for Parliament. 8, 11.

ULTRA VIRES—Act of directors - - 43
See Directors' Authority.

USAGE—Custom of country - - 242
See Custom of Country.

—— Market—Agent - - - Ex. Ch. 84
See Custom of Market.

VALUATION—Incoming tenant—Custom 242
See Custom of Country.

VALUED POLICY—Reopening valuation - 341
See Freight.

VOTE FOR PARLIAMENT—*Borough Vote—Description of Nature of Qualification—"Dwelling-house"—Reform Act*, 1832 (2 *Wm.* 4, *c.* 45) *s.* 27—*Representation of the People Act*, 1867 (30 *&* 31 *Vict. c.* 102) *s.* 3.] The qualification of a person on the list of voters for a borough was described as "dwelling-house." The name being objected to, the voter proved such a joint occupation of a dwelling-house as amounted to a qualification in respect of a "house" under the Reform Act (2 Wm. 4, c. 45), ss. 27 & 29. The revising barrister amended the description by striking out the word "dwelling," and retained the name on the list:—*Held* (by Willes, Keating, and Collier, JJ.;

VOTE FOR PARLIAMENT—*continued.*

Brett, J., dissenting), that the revising barrister was right in retaining the name, but that the amendment was unnecessary. Townshend *v.* Overseers of St. Marylebone - - 143

2. —— *Borough Vote—Description of Qualification—" House "—Amendment under* 6 *Vict. c.* 18, *s.* 40.] A claimant, in a borough in which freeholders have the franchise as well as occupiers, in his notice of claim, described his qualification as " house " :—*Held*, a sufficient description of a qualification as occupier of a house under 2 Wm. 4, c. 45, s. 27.—*Held*, also, that the revising barrister had power to amend the inaccuracy of description under s. 40 of 6 Vict. c. 18, by adding " occupier of." Ford *v.* Boon - - 150

3. —— *Borough Vote—Houses in Succession—Necessity for being rated—Payment of Rent by Landlord—Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *ss.* 3, 26—*Reform Act* (2 & 3 *Wm.* 4, *c.* 45), *s.* 28.] The claimant to a borough vote had been the inhabitant occupier of two dwelling houses in immediate succession, each being of the annual value of less than 10*l.*, for the period required by the 3rd and 26th sections of the Representation of the People Act, 1867. He had been rated to, and had paid, all poor-rates made in respect of the first house during his occupation thereof. With respect to the second house, the agreement between himself and his landlord was, that the landlord should pay the rates. A rate was made in respect of the second house during the claimant's occupation thereof, but his name did not appear in the rate; but all rates payable in respect of the premises had been paid by the landlord :—*Held*; that the latter part of the 28th section of the Reform Act must, by virtue of the provisions of the 56th and 59th sections of the Representation of the People Act, 1867, be read into s. 26 of that Act; that it was sufficient, therefore with respect to the second house, if the rates had been paid, without the claimant having been rated; that the payment by the landlord was, under the circumstances, a payment by the tenant; and that, consequently, the claimant was entitled to a vote. Moger *v.* Escott - 158

4. —— *Borough Vote—Payment of Rates*—30 & 31 *Vict. c.* 102, *s.* 3, *subs.* 4—*Payment excused by Reason of Poverty*—54 *Geo.* 3, *c.* 170, *s.* 11.] The rates, which,—under s. 3 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), and the prior and subsequent enactments which are to be construed with it, it is necessary that an inhabitant occupier should have paid before the 20th of July of the qualifying year,—are, only the rates made and allowed after the 5th of January of the year preceding the qualifying year, and payable up to the 5th of January of the qualifying year; and the excusal of such rates, whether made before or after the commencement of the qualifying year, does not prevent a disqualification arising from their not having been paid or tendered before the 20th of July of the qualifying year.—*Abel* v. *Lee* (Law Rep. 6 C. P. 365) explained. Cull *v.* Austin. Austin *v.* Cull 227

5. —— *County Vote—Deductions to be made in ascertaining the Net Yearly Value*—8 *Hen.* 6, *c.* 7.] Forty-eight persons were possessed, as tenants in common in fee, of land of the yearly value of 141*l.* 14*s.* 4*d.*, subject to deductions, for chief-rent, repairs, commission for collections of the rents, &c., amounting in the whole to 40*l.* 8*s.* 2*d.*, leaving a net yearly value of 101*l.* 4*s.* 2*d.* to be divided among the forty-eight owners. During the year ending on the 31st of July, 1871, for the convenience of the tenants, a sum of 21*l.* 19*s.* 1*d.* was expended by the owners in laying on water to the premises, in consideration of which the rent was increased to 143*l.* 2*s.* 10*d.*; and if the sum of 21*l.* 19*s.* 1*d.* were added to the other deductions proper to be made from the gross annual value, the interest of each tenant would be reduced below 40*s.* a year :—*Held*, that this outlay of 21*l.* 19*s.* 1*d.* for the improvement of the property ought not to be deducted; and the owners were, therefore, entitled to votes for the county. Buckley *v.* Wrigley - - - - - 185

6. —— *County Vote—Freehold Interest—Estate for Life—Allottee of Land.*] The corporation of Stafford were for many years before the Municipal Corporations Act, 1835, possessed of certain lands within the borough, which were thus dealt with :—Each member of the council of the borough had two acres of such land for his life, which his widow after his decease continued to occupy, while a widow and a resident in the borough. The rest of the lands were held in allotments of one acre by the persons selected for that purpose by the mayor, and rents of various amounts were paid in respect of such occupation. In 1836 a bye-law was passed by the town council which provided that the lands should thenceforth be held and enjoyed in allotments of one acre each by " poor and necessitous " burgesses of the borough at rents to be fixed and ascertained by the council of the borough from time to time, as occasion should require, at the reasonable discretion of the council. The bye-law further provided, that for the purposes thereof only such persons should be considered poor and necessitous burgesses as were declared to be so by the majority of a meeting of the council, and that certain grounds of preference mentioned in the bye-law, viz. seniority as a burgess and number of children, should be regarded alternately in the selection of such burgesses. It was also provided that if any burgess died in the occupation of such lands, and left a widow, such widow should continue to occupy, if a resident in the borough. One of the burgesses of Stafford had been declared by a meeting of the council to be a " poor and necessitous " burgess, and had been admitted to an acre of the land in question under an order of the council, which ordered that such acre should be delivered to him as tenant thereof to the council, and that he should pay 5*s.* per annum as and for rent until further notice :—*Held*, that the interest of the burgess in the land to which he was so admitted did not amount to a freehold estate for life so as to entitle him to a vote for the county. Fernie *v.* Scott - 202

7. —— *County Vote—Shares in Bridge—Right to Tolls—" Tenement " within* 8 *Hen.* 6, *c.* 7.] In 1724, an Act (12 Geo. 1, c. 36) passed for the purpose of enabling certain " commissioners and trustees " to erect a bridge across the Thames between Fulham and Putney. By that Act provi-

VOTE FOR PARLIAMENT—*continued.*

sion was made for incorporating the commissioners and trustees, so as to enable them to purchase land and to sell or assign the same at their pleasure (but no incorporation took place); and they were impowered to levy a pontage or toll for passage over the bridge, and they or any eleven or more of them (when incorporated) were authorized to convey *the toll* so granted by the Act, by indenture under their common seal, by way of security for money borrowed by them for the purposes of the Act. In 1728, another Act (1 Geo. 2, c. 18) was passed to explain and amend the former Act. By s. 1 it was enacted that the commissioners and trustees, or any nine or more of them, and the commissioners and trustees "when incorporated in pursuance of the former Act," might contract with any person or persons to erect and repair the bridge; and by s. 3 the commissioners and trustees, or any nine or more of them, before incorporation, and the corporation when created, were impowered to convey over in perpetuity or otherwise, "all or any toll, revenues, profits, or incomes of or belonging to the bridge," to such persons as would undertake to erect the same; and by s. 5 it was enacted that, when the purchase-money provided by the first Act should be paid to the proprietors of certain then-existing ferries, "the said ferries and passage over the river, and the ground and soil adjacent and belonging to the respective ferries, should be transferred to and absolutely vested in the commissioners and trustees.—In November, 1728, the commissioners contracted with thirty persons who had each subscribed 1000*l.* to make the required payments and build the bridge, and by indentures, reciting the various provisions of the Acts, they granted and assigned to trustees for the thirty subscribers "the said bridge, and all the materials wherewith the same was built, and all tolls, revenues, profits, and incomes of or belonging to the said bridge," "with all such ground and soil adjacent and belonging to the then late or then present horse-ferries and passage over the river as had been, was, or should be vested in the said commissioners," &c., upon trust to permit and suffer the said thirty persons, their heirs and assigns, to receive the toll and have the sole management and direction thereof, and divide the net proceeds amongst themselves according to their respective rights and interests therein,—to hold as tenants in common.—By the Thames Navigation Act, 1870 (33 & 34 Vict. c. cxlix.) s. 10, subs. 6, it was provided, that "the bridges and the lands thereunto belonging, and the tolls, revenues, profits, and income of or belonging to the same, shall be vested in the committee of management and their successors for the time being, subject to the trusts on which the same are held at the passing of this Act":—*Held*, affirming *Tepper* v. *Nichols* (18 C. B. (N. S.) 121; 34 L. J. (C.P.) 61), that the commissioners had no power to convey the bridge and land, but only the tolls; and that the holders of shares in the bridge claiming through the thirty subscribers were not owners of a "tenement" within 8 Hen. 6, c. 7, so as to be entitled to a county vote; and that the Thames Navigation Act in no respect altered the nature of the interest which the holders of shares in the bridge had under the former Acts, so as to give them an interest in land which they did not possess before. Wadmore *v.* Dear. Wadmore *v.* Aries - 212

8. —— *County Vote—12l. Occupier—Occupation under different Landlords—Separate Ratings—Representation of the People Act,* 1867 (30 & 31 *Vict. c.* 102), *s.* 6.] It is not necessary, in order to entitle an occupier of lands to a vote under the 6th section of the Representation of the People Act, 1867, that he should have occupied such lands in one holding, or under the same landlord, or that there should have been one entire rating of the whole of the qualifying property. It is sufficient if the aggregate rateable value of lands occupied under different landlords amounts to 12*l.*, and the occupier has been rated to all rates made during his occupation in respect of the several pieces of land so occupied by him respectively. Huckle *v.* Piper - - - - 193

9. —— *County Vote—Sub-Lessee for Sixty Years—"Term originally created"—Representation of the People Act,* 1867 (30 & 31 *Vict. c.* 102), *s.* 5—*Reform Act,* 1832 (2 *Wm.* 4, *c.* 45), *s.* 20.] A sub-lessee is within the provisions of the 5th section of the Representation of the People Act, 1867, which gives the right of voting to the lessee or assignee of lands or tenements for the unexpired residue of any term originally created for a period of not less than sixty years, &c.—*Semble,* per Brett, J., that the effect of ss. 56 and 59 of the Representation of the People Act is, that the proviso to s. 20 of the Reform Act must be read into s. 5 of the Representation of the People Act, and therefore that to be entitled to a vote under that section the sub-lessee must be in actual occupation of the premises. Chorlton *v.* Overseers of Stretford - - - - - - 198

10. —— *County Vote—Insufficient Local Description of Qualification—Change in Numbers on Houses—Amendment—Registration Act,* 1843 (6 *Vict. c.* 18), *s.* 40.] The description of the qualification of a county voter in the third and fourth columns of the register was, "Freehold house and shop," "4, English Street."—At the time when his name was placed on the register, the voter's house was numbered "4." Subsequently, the numbers of the houses were altered by competent local authority; and that house became No. 9, another house in the street becoming No. 4. On objection to the vote:—*Held*, that the revising barrister had power under s. 40 of the Registration Act, 1843, to amend the description to "9" from "4," as being an insufficient description of the qualification. Bendle *v.* Watson - - 163

11. —— *County Vote—Notice of Claim in respect of a* 12*l. Occupation*—6 *Vict. c.* 18, *s.* 15, *sch. B. No.* 6—31 & 32 *Vict. c.* 58, *s.* 17.] A 12*l.* occupier served upon the overseers on the 25th of August a notice of claim in the form given in 6 Vict. c. 18, sch. A. No. 2,—"I claim to be inserted on the list of voters for the division of East Devonshire;" and in the third column the "nature of qualification" was stated to be "Land as occupier:"—*Held*, a good notice, as a sufficient compliance with 31 & 32 Vict. c. 58, s. 17, and 6 Vict. c. 18, s. 15. Firth *v.* Overseers of Widdicombe-in-the-Moor - - - - - - 172

12. —— *County Vote—Notice of Objection—Statement of Ground of Objection*—28 *Vict. c.* 36,

VOTE FOR PARLIAMENT—*continued*

s. 6.] A notice of objection to a voter on the register of county voters, stated that the objection was grounded on the third column, and that it related to the nature of the voter's interest in the qualifying property. The objection sought to be proved was, that the qualifying property, being situate within a parliamentary borough, was such and so occupied as to give the right of voting for the borough:—*Held*, a sufficient notice of objection within the terms of 28 Vict. c. 36, s. 6. Simey *v.* Dixon - - - - - - 190

13. —— *County Vote—Notice of Objection—Description of Objector—Parish in Two Polling Districts, under* 31 *&* 32 *Vict. c.* 58, *s.* 22.] By s. 22 of the Registration Act, 1868 (31 & 32 Vict. c. 58), "where any parish in a county, city, or borough forms part of more than one polling district, the part of such parish situate in each polling district shall be deemed to be a separate parish for the purpose of the revision of voters and the lists and register of votes."—The township of S. was separated into two polling districts, and the overseers prepared separate lists for each district under the above section. In a notice of objection, sent to a county voter, the objector described himself as "on the register of voters for the township of S.":—*Held*, that the notice was sufficient, and need not specify on which of the two lists his name appeared. Chorlton *v.* Overseers of Tonge 178

WAIVER OF FORFEITURE—*Landlord and Tenant—Ejectment—Distress for Rent.*] A lease of a farm contained a condition of re-entry for breaches of covenants. Breaches of covenants took place before the 24th of June, 1871. The lessors brought ejectment against the tenant on the 21st of July, 1871; but the writ did not claim possession as from any antecedent date. After the commencement of the action, but before trial, the lessors distrained for rent due up to the 24th of June, 1871:—*Held*, that by such distress they had not precluded themselves from relying at the trial on any breach of covenant before the 24th of June, 1871, on the ground that by bringing ejectment they had unequivocally declared their election to determine the lease on any ground of forfeiture which had not been waived before the commencement of the action, and that the subsequent distress, if not justifiable under the 8 Anne, c. 14, which enables the landlord under certain circumstances to distrain after the determination of the tenancy, was a distress. Grimwood *v.* Moss - - - - - 360

WAIVER OF IRREGULARITY—*Practice—Affidavit—Omission of Addition of Deponent—R. G.* 138. *H. T.* 1853.] The omission of the deponent's addition in an affidavit constitutes an irregularity only and may be waived.—Where a rule nisi has been obtained to strike two attorneys in partnership off the rolls and on shewing cause against the rule the two appeared separately, and counsel for one took objection to the affidavit on which the rule had been obtained on the ground that it did not give the deponent's addition, but counsel for the other waived the objection so far as his client was concerned:—*Held*, that though the rule must be quashed so far as it related to the one, the counsel for the other might proceed to shew cause against the rule so far as it concerned his client. *Ex parte* King - - 77

WARRANTY OF SEAWORTHINESS—*Ship and Shipping—Charterparty—Condition Precedent—Ship unfit for Cargo—Obligation of Shipowner.*] A charterparty provided that the ship should load a full and complete cargo of sugar in bags, hemp in compressed bales, and [or] measurement goods. It likewise specified different rates of freight for dry and wet sugar. The ship proceeded to her port of loading, where a cargo of wet sugar was provided for her by the charterer. A great deal of moisture drains from wet sugar, and when the cargo had been nearly all shipped it was found that there was such an accumulation of molasses in the hold—the result of drainage from the sugar—that the ship would not be seaworthy for the voyage if she proceeded in her then condition. Owing to the nature of the material and the depth of the hold, the ship's pumps were unable to clear the ship of the drainage from the sugar. The ship was perfectly seaworthy except with respect to this particular cargo, and the pumps were quite sufficient for all ordinary purposes. The sugar had to be unloaded again, and the charterer then refused to reload it or to provide any other cargo. Cross actions were brought—the one by the shipowner against the charterer for refusing to provide a cargo, and the other by the charterer against the shipowner to recover damages by reason of the ship not being fit to carry the cargo provided for her.—At the trial the jury, in answer to questions left to them by the judge, found that the cargo of sugar which was offered was a reasonable cargo to be offered; that the ship was not reasonably fit to carry a reasonable cargo of wet sugar; that the ship could not have been made fit within such a time as would not have frustrated the object of the adventure; and that the ship would not, without new pumps, and with a reasonable cargo of wet sugar on board, have been seaworthy:—*Held*, that the shipowner, by entering into the charterparty, undertook that the ship should be reasonably fit for the carriage of a reasonable cargo of any of the kinds of goods specified in the charterparty, and consequently of a reasonable cargo of wet sugar; and that, upon the findings of the jury that she was not so fit, and could not be made so in such a time as not to frustrate the object of the voyage, the charterer was entitled to succeed in both actions. Stanton *v.* Richardson. Richardson *v.* Stanton - - 421

WASHING CART ON HIGHWAY—Nuisance—Damage - - - - 253
See Proximate Cause of Injury.

WEEKLY HIRING—Evidence - - 138
See Evidence to vary written Contract.

WEIGHTS AND MEASURES—*Stamping—5 & 6 Wm.* 4, *c.* 63, *s.* 21.] Where weights or measures have once been duly stamped or sealed under s. 21 of 5 & 6 Wm. 4, c. 63, but the stamp or seal

WEIGHTS AND MEASURES—*continued.*
has become obliterated by time and use, the person using them is not liable to the penalty imposed by that section for the use of unauthorized weights or measures, provided such weights or measures be otherwise unobjectionable. STARR *v.* STRINGER - - - - - - 383

WINDING-UP—Company—Calls— - 629
See INDEMNITY AGAINST CALLS.

WORDS—"Any divine service, rite, or office."
See OFFERTORY. [393
—— "Celebrating divine service." - 393
See OFFERTORY.
—— "Freight" - - - - - 341
See "FREIGHT."
—— "Merchandise in trust or on commission for which the assured are responsible" 25
See BAILMENT IN TRUST.

WORDS—*continued.*
—— "Parish or place" - - - 378
See "PARISH OR PLACE."
—— "Place" - - - - - 378
See "PARISH OR PLACE."
—— "Shipment in June and [or] July"
[Ex. Ch. 530
See SHIPMENT IN JUNE AND [OR] JULY.
—— "Stranding" - - - - - 570
See STRANDING.
—— "Tenement" - - - - - 212
See VOTE FOR PARLIAMENT. 7.
—— "Term originally created" - - 198
See VOTE FOR PARLIAMENT. 9
—— "Tillage" - - - Ex. Ch. 72
See "TILLAGE."
"WITHHOLDING OR MISAPPLYING" - 405
See FRIENDLY SOCIETY.

END OF VOL. VII.

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET
AND CHARING CROSS.

UL 17 SEP 1962